TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 491

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS,

vs.

W. Q. VAN COTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

PETITION FOR CERTIORARI FILED DECEMBER 1, 1938.

CERTIORARI GRANTED JANUARY 3, 1939.

SUPREME COURT OF THE UNITED STATES

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THE STATE TAX COMMISSION OF UTAH ET AL., PETITIONERS,

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W. Q. VAN COTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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SCHEDULE D - INCOME FROM DIVIDENDS

Union Oil Co.	$ 10.00
American Tel. & Tel.	270.00
Standard Oil of Cal.	15.00
Union Carbide	8.00
General Electric	7.00
Z. C. M. I.	2.00
Utah Power & Light 7% pfd.	17.50
	$329.50

[fol. 2] [The Great Seal of the State of Utah]

A 301

THE STATE OF UTAH,

State Tax Commission,

118 State Capitol,

Salt Lake City

May 25, 1936.

Waldemar Q. Van Cott, 1311 Walker Bank Building, Salt Lake City, Utah

DEAR SIR:

As a result of a recent examination of your Income Tax Return, this office proposes to make adjustments shown in the attached statement with respect to your income tax liability for the year.

If you acquiesce in the proposed tax liability, you may make immediate payment without awaiting formal assessment and notice and demand. If payment is so made the interest period will terminate on the date of payment, otherwise, interest will run to the date the deficiency is assessed and the assessment may be made only as provided under Section 80-14-29 of the Revised Statutes of Utah, 1933.

If you do not acquiesce in the proposed tax liability, you should file a petition with the Tax Commission for a redetermination of the deficiency. This petition, in writing, should be filed within sixty days from date of this notice. Any petition so filed will be given consideration and you will be given notice and an opportunity for a hearing before the Tax Commission.

Respectfully yours, State Tax Commission, by Rulon T. Jeffs, Auditing Department.

Enclosures: 3.
Statement of Adjustments.
#28/ALR.

(Here follow four photolithographs, side folios 3-6)

A 302

Name of Taxpayer: Waldemar S. Van Cott

Schedule 1

Net Income Year Ended 12-31-39

Net Income Reported on Return		$ 2,176.79
Add: Unallowable Deductions and Additional Income		
(a) Salary received from Reconstruction		
( ) Finance Corporation	6,000.00	
(b) Salary received from Regional Agricultural		
( ) Credit Corporation	1,981.00	
(c) Proportion of partnership profit taxes	53.50	
( ) (Refer to Schedule #2 for explanation)		
( )		
Total Additions		8,034.50
Total		$ 10,211.29
Deduct: Nontaxable Income and Additional Deductions		
( )		
( )		
( )		
( )		
( )		
Total Deductions		
Net Income Corrected		$ 10,211.29

FORM TC-40
STATE TAX COMMISSION
(Auditor's Stamp)

1935 STATE OF UTAH 1935
INDIVIDUAL INCOME TAX RETURN
Under Revised Statutes of Utah, 1933 as Amended
For Calendar Year 1935

Fiscal Year begun _____, 1934, and ended _____, 1935
Your taxable year is the calendar year 1935 unless you regularly keep books on the basis of a fiscal year in which case your taxable year is such fiscal year.

DO NOT WRITE IN THESE SPACES

Serial Number _____
Receipt Number _____
Amount Paid $ _____
(Cashier's Stamp)

WALDEMAR Q. VAN COTT
1311 WALKER BANK BUILDING
SALT LAKE CITY, UTAH

If Name and Address is not correctly printed in the above space, print the same plainly below.

(Name)

(Street and Number)

(Post Office) (County) (State)

Occupation Lawyer

Cash ☐ Check ☐ M. O. ☐

File this return on or before March 15, 1936, with the State Tax Commission, 118 State Capitol, Salt Lake City, Utah. Retain duplicate and working papers for inspection.

This form should be used for incomes from business, profession, farming, rents, or sale of property.

1. Were you married and living with wife (or husband) on the last day of your taxable year? Yes
2. If so, what is given name of wife (or husband)? Beth Van Cott
3. If not, were you the head of a family? _____
4. Did you file a return for the year 1934? Yes
   If not, give reason _____
5. Is a separate return being filed by your wife (or husband)? No
6. How many dependent persons (other than wife or husband) under 21 years of age or incapable of self support because mentally or physically defective were receiving their chief support from you on December 31, 1934? Two

Item and Instruction No.	INCOME	Amount Received	Expenses Paid (Explain in Schedule E)			
1.	Salaries, Wages, Commissions, etc. (State name and address of employer)	$	$			
2.	Income from Business or Profession. (From Schedule A)					
3.	Interest					
4.	Income from Partnerships. (State name and address) Van Cott, Riter & Farnsworth, Lawyers, 1311 Walker Bank Building, Salt Lake City, Utah			80		
5.	Income from Fiduciaries. (State name and address)			9443		
6.	Rents and Royalties. (From Schedule B)					
7.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)			801	71	
8.	Dividends on Stock of Domestic and Foreign Corporations (From Schedule D)			329	50	
9.	Other Income. (State nature of income) (a)					
	(b)					
10.	TOTAL INCOME IN ITEMS 1 TO 9				$ 10654	21
	DEDUCTIONS					
11.	Interest Paid			$		
12.	Taxes Paid. (Explain in Schedule E)			402	80	
13.	Losses by Fire, Storm, etc. (Explain in Table at foot of Page 2)					
14.	Bad Debts. (Explain in Schedule E)					
15.	Contributions. (Explain in Schedule E)					
16.	Other Deductions Authorized by Law. (Explain in Schedule E)			85	62	
17.	TOTAL DEDUCTIONS IN ITEMS 11 to 16			7989		
18.	NET INCOME (Item 10 minus Item 17) (Enter on Item 19)				$ 8477	42

COMPUTATION OF TAX
(To be Filled in by Taxpayer)

Utah. Retain duplicate and working papers for inspection.

(Post Office) (County) (State)

Occupation Lawyer

sale of property.

1. Were you married and living with wife (or husband) on the last day of your taxable year? Yes
2. If so, what is given name of wife (or husband)? Beth Van Cott
3. If not, were you the head of a family?
4. Did you file a return for the year 1934? Yes
   If not, give reason.
5. Is a separate return being filed by your wife (or husband)? No
6. How many dependent persons (other than wife or husband) under 21 years of age or incapable of self support because mentally or physically defective were receiving their chief support from you on December 31, 1934? Two

Item and Instruction No.	INCOME	Amount Received	Expenses Paid [Explain in Schedule E]				
1.	Salaries, Wages, Commissions, etc. (State name and address of employer)	$	$	$			
2.	Income from Business or Profession. (From Schedule A)						
3.	Interest						
4.	Income from Partnerships. (State name and address) Van Cott, Riter & Farnsworth, Lawyers, 1311 Walker Bank Building, Salt Lake City, Utah			80			
5.	Income from Fiduciaries. (State name and address)			9443			
6.	Rents and Royalties. (From Schedule B)						
7.	Profit from Sale of Real Estate, Stocks, Bonds, etc. (From Schedule C)						
8.	Dividends on Stock of Domestic and Foreign Corporations (From Schedule D)			801	71		
9.	Other Income. (State nature of income)			329	50		
	(a)						
	(b)						
10.	TOTAL INCOME IN ITEMS 1 TO 9					$ 10654	21
	DEDUCTIONS						
11.	Interest Paid						
12.	Taxes Paid. (Explain in Schedule E)			$ 402	80		
13.	Losses by Fire, Storm, etc. (Explain in Table at foot of Page 2)						
14.	Bad Debts. (Explain in Schedule E)						
15.	Contributions. (Explain in Schedule E)						
16.	Other Deductions Authorized by Law. (Explain in Schedule E)			85	62		
17.	TOTAL DEDUCTIONS IN ITEMS 11 to 16			7989			
18.	NET INCOME (Item 10 minus Item 17) (Enter as Item 19)					$ 8477	42
						$ 2176	79

COMPUTATION OF TAX
(To be Filled in by Taxpayer)

19.	Net Income (Item 18)					$ 2176	79
20.	Less: Personal Exemption (Single, $800.00; married, living with husband or wife, $1200.00)	$ 1200					
21.	Credit for Dependents (Each dependent authorized by law $400.00)	600					
22.	TOTAL EXEMPTIONS IN ITEMS 20 AND 21					1800	
23.	TAXABLE NET INCOME (Item 19 minus Item 22)					$ 376	79
24.	Amount Taxable at 1% (not over first $1,000.00 of Item 23)	$ 376	79	30. Tax (1% of Item 24)		3	77
25.	" " " 2% (" " second $1,000.00 " " 23)			31. " (2% " " 25)			
26.	" " " 3% (" " next $1,000.00 " " 23)			32. " (3% " " 26)			
27.	" " " 4% (" " " $1,000.00 " " 23)			33. " (4% " " 27)			
28.	" " " 5% (Balance of Taxable Net Income)			34. " (5% " " 28)			
29.	TOTAL (Items 24 to 28 inclusive must total same as Item 23)	$ 376	79				
35.	TOTAL TAX (Items 30 to 34 inclusive) Payable in full on or before March 15, 1936					$ 3	77

AFFIDAVIT

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and to the best of my knowledge and belief is a true and complete return made in good faith for the taxable year stated, pursuant to the Revised Statutes of Utah, 1933 as amended, and the Regulations issued thereunder.

(If return is made by agent, the reason therefor must be stated on this line)

Sworn to and subscribed before me this 14th day of March, 1936

(Signed) Waldemar Q. Van Cott
(Signature of taxpayer or agent)

NOTARIAL SEAL

K. F. Hall, Notary Public
(Signature of officer administering oath)
Residing at Salt Lake City
(Address of agent)

Commission expires
October 1, 1936

An amended return must be marked "Amended" at top of return.

Checks and drafts will be accepted only if payable at par.

SCHEDULE A—INCOME FROM BUSINESS OR PROFESSION (See Instruction 2)

1. Total receipts from business or profession (state kind of business) ____ $ ____

Cost of Goods Sold

2. Labor	$	
3. Material and Supplies		
4. Merchandise bought for sale		
5. Other costs (Itemize below or on separate sheet)		
6. Plus inventory at beginning of year		
7. Total (Lines 2 to 6)	$	
8. Less inventory at end of year		
9. Net cost of goods sold (Line 7 minus Line 8)	$	

Enter "C," or "C or M," on Lines 6 and 8 to indicate whether inventories are valued at cost, or cost or market whichever is lower.

Other Business Deductions

10. Salaries not included as "Labor" in Line 2. (Do not deduct compensation for your services)	$	
11. Interest on business indebtedness to others		
12. Taxes on business and business property		
13. Losses. (Explain in table at foot of page)		
14. Bad debts arising from sales or services		
15. Depreciation, obsolescence, and depletion. (Explain in table provided at foot of page)		
16. Rent, repairs, and other expenses (Itemize below or on separate sheet)		
17. Total (Lines 10 to 16)	$	
18. Total Deductions (Line 9 plus Line 17)		$
19. Net Profit (Line 1 minus Line 18) (Enter as Item 2)		$

Explanation of Deductions Claimed on Lines 5 and 16 ____

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See Instruction 6)

1. Kind of Property	2. Amount Received	3. Cost or Value as of January 1, 1931, Whichever Greater — Basis Used	3. Cost or Value as of January 1, 1931, Whichever Greater — Amount	4. Depreciation (Explain in Table at Foot of Page)	5. Repairs	6. Other Expenses (Itemize Below)	7. Net Profit (Enter as Item 6)
	$		$	$	$	$	$

Explanation of Deductions Claimed in Column 6 ____

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 7)

1. Kind of Property	2. Date Acquired	3. Amount Realized	4. Depreciation Allowable Since Acquisition	5. Cost or Value as of January 1, 1931, Whichever Greater — Basis Used	5. Cost or Value as of January 1, 1931, Whichever Greater — Amount	6. Subsequent Improvements	7. Net Profit (Enter as Item 7)
200 Mt. City Copper Co. stock	4-2[illegible]-35	$ 787 96	$		$ 163	$	$ 624 96
4000 U. S. Treas. Bonds 3½ 1951-5	3-20-34	4143 75			3967		176 75

State How Property Was Acquired Purchase

801.71

SCHEDULE D—INCOME FROM DIVIDENDS

Name Under Which Stock is Held	Date Received	Amount Taxable (Enter as Item 8)	Amount Non-Taxable
		$	$

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

12. Home $120.87 Fed. Inc. Tax $152.19; Auto $12.24; Dues Alta Club $12.00 Country Club $12.00 proportion of partnership property tax $53.50; Sales tax (est) $40.00.
15. Cornell University $20.00; Community Chest, Salt Lake $65.62
16. Dues American Bar Association $8.00
Salary as Agency Counsel Salt Lake Agency of Reconstruction Finance Corporation, an agency of the United States, $6,000.00
Salary as counsel for Regional Agricultural Credit Corporation, an agency of the United States, $1981.

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If Buildings, State Material of Which Constructed)	2. Date Acquired	3. Age When Acquired	4. Possible Life After Acquirement	5. Cost or Value as of January 1, 1931, Whichever Greater — Basis Used	5. Cost or Value as of January 1, 1931, Whichever Greater — Amount	Amount of Depreciation Claimed on This — 6. Previous Years	Amount of Depreciation Claimed on This — 7. This Year
					$	$	$

Explanation of Deductions Claimed in Column 6

SCHEDULE C—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 7)

1. Kind of Property	2. Date Acquired	3. Amount Realized	4. Depreciation Allowable Since Acquisition	5. Cost or Value as of January 1, 1931, Whichever Greater — Basis Used	5. Cost or Value as of January 1, 1931, Whichever Greater — Amount	6. Subsequent Improvements	7. Net Profit (Enter as Item 7)
200 Mt. City Copper Co. stock	4-20-32-35	$ 787 96	$		$ 163	$	$ 624 96
4000 U. S. Treas. Bonds 3½ 1951-	5 3-20-34	4143 75			3967		176 75

State How Property Was Acquired: Purchase

801.71

SCHEDULE D—INCOME FROM DIVIDENDS

Name of Stock	Date Received	Amount Taxable	Amount Non-Taxable
		$	$
		(Enter as Item 8)	

SCHEDULE E—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 12, 14, 15, AND 16

12. Home $120.87 Fed. Inc. Tax $152.19; Auto $12.24; Dues Alta Club $12.00 Country Club $12.00 proportion of partnership property tax $53.50; Sales tax (est) $40.00.
15. Cornell University $20.00; Community Chest, Salt Lake $65.62
16. Dues American Bar Association $8.00
Salary as Agency Counsel Salt Lake Agency of Reconstruction Finance Corporation, an agency of the United States, $6,000.00
Salary as counsel for Regional Agricultural Credit Corporation, an agency of the United States, $1981.

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

1. Kind of Property (If Buildings, State Material of Which Constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of January 1, 1931, Whichever Greater — Basis Used	5. Cost or Value as of January 1, 1931, Whichever Greater — Amount	Amount of Depreciation Charged Off — 6. Previous Years	Amount of Depreciation Charged Off — 7. This Year
					$	$	$

001

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A, AND IN ITEM 13

1. Kind of Property	2. Date Acquired	3. Cost or Value as of January 1, 1931, Whichever Greater — State Which Used	3. Cost or Value as of January 1, 1931, Whichever Greater — Amount	4. Subsequent Improvements	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss
			$	$	$	$	$

TAX EXEMPT INTEREST AND NONTAXABLE DIVIDENDS (See Instructions 3, 8, and 22)

1. Obligations or Securities	2. Amount Owned	3. Interest Received
(a) Bonds issued by the State of Utah	$	$
(b) Securities issued under the provisions of an Act of Congress		
(c) Obligations of the United States or its possessions (Give description)		

[fol. 8] Dated May 27, 1936.

W. Q. Van Cott, Address: 1311 Walker Bank Building, Salt Lake City, Utah.

State Tax Commission of the State of Utah hereby acknowledges receipt of an exact duplicate original of the within petition for the redetermination of the tax, said petition having been filed in this office on the 28th day of May, 1936.

State Tax Commission of the State of Utah, by W. W. Dansie, its Chief Auditor.

[fol. 9] BEFORE STATE TAX COMMISSION OF UTAH

Petition for Redetermination of Tax

STIPULATION OF FACTS

It is hereby stipulated by W. Q. Van Cott and the State Tax Commission of the State of Utah as follows:

The first hearing of the petition for re-determination of the tax came on for hearing June 29, 1936 at 11 A. M. W. Q. Van Cott was the only witness, who was sworn and testified. His evidence and statements were taken down by a reporter provided by the State Tax Commission. Since that time such reporter has become unavailable to furnish a transcript of the statements made. Accordingly the parties hereby stipulate that the following is a correct description of the statements there made and together with the transcript of the further hearing on August 4, 1936, certified to by the reporter, E. M. Garnett, who took such further proceedings, constitute a full record of all of the statements, evidence and proceedings had in such hearings.

W. Q. VAN COTT, being first duly sworn, made the following statements under oath:

My name is W. Q. Van Cott. All of the income which is here in question was paid to me out of the treasury of the United States on account of my positions as Agency Counsel of the Salt Lake Agency of the Reconstruction Finance Corporation and as Counsel for the Regional Agricultural Credit Corporation of Salt Lake City, Utah. Herein the former will be referred to sometimes as R. F. C. and the latter sometimes as R. A. C. C.

The Salt Lake Agency of the R. F. C. performs the functions of that corporation in the State of Utah, the eastern tier of counties in Nevada and in Idaho, Boise and south thereof. My services for the R. F. C. commenced in March [fol. 10] 1932 and have been continuous to date. My services for the R. A. C. C. commenced at the time of the organization of that corporation in September, 1932 and has continued to date. The Salt Lake office of the R. A. C. C., for which my services as counsel have been devoted, has performed the functions of the R. A. C. C. in the State of Utah, the eastern tier of counties in Nevada, the southern part of Idaho, the southwestern part of Wyoming, the western part of Colorado and the northern part of Arizona, called the Arizona Strip.

For services in both capacities I have been paid throughout by checks drawn on the Treasurer of the United States by the Treasurer of the R. F. C. and R. A. C. C. respectively. In using the mails in this business I have consistently used Government penalty envelopes without payment of postage. When I have traveled by train on this business I have paid the reduced rates allowed to the United States Government and its employees.

All of the capital of the R. F. C. has been provided by the United States. The United States is the sole stock holder thereof. Any profits made by it will be the property of the United States. Any losses suffered by it will be the losses of the United States. None of its stock has ever been owned by any person or body other than the United States and it was never contemplated that there would be any such other ownership.

Whenever the R. F. C. or R. A. C. C. has become involved in litigation in my territory, with a single exception, it has been a plaintiff and the action has been to collect debts. The uniform course has been for the R. F. C. or the R. A. C. C. to request the Department of Justice to instruct the United States District Attorney to join the United States as a party plaintiff and those actions have always been prosecuted in the joint names of the United States of America and the R. F. C. or R. A. C. C.

The single exception to the above statement was an action wherein the R. F. C. sued one Wines on a note. Wines was a resident of Nevada and service could not be had on him. The proceeds of a fire insurance policy in his favor were available for garnishment within the State of Utah. Under

the Federal statutes such garnishment is not allowed [fol. 11] because service could not be had in person on the defendant. Accordingly the action was brought in the State court. The County Clerk declined to issue a writ of garnishment without bond. A petition for a writ of mandamus requiring him to do so was filed and the writ granted by that court, Judge—now Justice—Wolff hearing the case.

Exhibit 1

Exhibit 1 is a pamphlet printed by the United States Government Printing Office entitled, "Reconstruction Finance Corporation Act as amended and Other Laws and Documents Pertaining to Reconstruction Finance Corporation." The same was introduced in evidence and made part of the record.

Attention was called to the title of the Act and the opening portion thereof, as follows:

"An Act To provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be, and is hereby, created a body corporate with the name 'Reconstruction Finance Corporation' (herein called the corporation). That the principal office of the corporation shall be located in the District of Columbia, but there may be established agencies or branch offices in any city or cities of the United States under rules and regulations prescribed by the board of directors. This Act may be cited as the 'Reconstruction Finance Corporation Act.'

"Sec. 2. The corporation shall have capital stock of $500,000,000, subscribed by the United States of America, payment for which shall be subject to call in whole or in part by the board of directors of the corporation.

"There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $500,000,000, for the purpose of making payments upon such subscription when called:"

Attention was further called to the following part of the Act appearing on page 2 of Exhibit 1:

"* * * Nothing contained in this or in any other Act shall be construed to prevent the appointment and compensation as an employee of the corporation of any officer or employee of the United States in any board, commission, independent establishment, or executive department thereof."

Attention was also called to the following portion of Section 4 of the Act appearing on page 3 of Exhibit 1:

[fol. 12] "The corporation shall have succession for a period of ten years from the date of the enactment hereof, unless it is sooner dissolved by an Act of Congress. It shall have power to adopt, alter, and use a corporate seal, which shall be judicially noticed; to make contracts; to lease such real estate as may be necessary for the transaction of its business; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of the business of the corporation, without regard to the provisions of other laws applicable to the employment and compensation of officers or employees of the United States; to define their authority and duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and to prescribe, amend, and repeal, by its board of directors, by-laws, rules, and regulations governing the manner in which its general business may be conducted and the powers granted to it by law may be exercised and enjoyed, including the selection of its chairman and vice chairman, together with provisions for such committees and the functions thereof as the board of directors may deem necessary for facilitating its business under this Act. The board of directors of the corporation shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid. The corporation shall be entitled to the free use of the United States mails in the same manner as the executive departments of the Government. The corporation, with the consent of any board, commission, independent establishment, or executive department of the Government, including any field service thereof, may avail itself of the use of information, services, facilities, officers and employees thereof in carrying out the provisions of this Act."

Attention was called to the following portion of Section 5 of the Act appearing on pages 3 and 4 of Exhibit 1:

"To aid in financing agriculture, commerce and industry, including facilitating the exportation of agricultural and other products, the corporation is authorized and empowered to make loans, upon such terms and conditions not inconsistent with this Act as it may determine, to • • • ."

Attention was called to sub-section (e) appearing on page 15 of Exhibit 1 as follows:

"The provisions of sections 112, 113, 114, 115, 116, and 117 of the Criminal Code of the United States (U. S. C., title 18, ch. 5, secs. 202 to 207, inclusive) in so far as applicable, are extended to apply to contracts or agreements with the corporation under this Act, which for the purposes hereof shall be held to include loans, advances, discounts, and rediscounts; extensions and renewals thereof; and acceptances, releases, and substitutions of security therefor."

Attention was called to Sections 202 to 207, U. S. C., Title 18, containing criminal provisions respecting activities of officers and agents of the United States.

[fol. 13] Attention was called to the first portion of Section 1 of Title 1 of the Act relating to relief of destitution appearing on page 16 of Exhibit 1, as follows:

"The Reconstruction Finance Corporation is authorized and empowered to make available out of the funds of the corporation the sum of $300,000,000, under the terms and conditions hereinafter set forth, to the several States and Territories, to be used in furnishing relief and work relief to needy and distressed people and in relieving the hardship resulting from unemployment, but not more than 15 per centum of such sum shall be available to any one State or Territory."

Attention was called to the first portion of Section 201 of the Act appearing on page 18 of Exhibit 1, as follows:

"Sec. 201 (a). The Reconstruction Finance Corporation is authorized and empowered—

(1) to make loans to, or contracts with, States, municipalities, and political subdivisions of States, public agencies

of States, of municipalities, and of political subdivisions of States, public corporations, boards and commissions, and public municipal instrumentalities of one or more States, to aid in financing projects authorized under Federal, State, or municipal law which are self-liquidating in character, such loans or contracts to be made through the purchase of their securities, or otherwise, and for such purpose the Reconstruction Finance Corporation is authorized to bid for such securities: Provided, That nothing herein contained shall be construed to prohibit the Reconstruction Finance Corporation, in carrying out the provisions of this paragraph, from purchasing securities having a maturity of more than ten years; * * *"

Exhibit 1-A, being Circular No. 4 of the Reconstruction Finance Corporation on the subject of its Powers and Functions, dated February, 1936, and Exhibit 2-A, being a circular of the Reconstruction Finance Corporation entitled, "Summary of the Activities of the Reconstruction Finance Corporation and its Condition as of December 31, 1935," were offered and admitted in evidence as evidence of the facts therein set forth, their competency in those particulars being stipulated.

Attention was called to sub-section (2) of Section 201 of the Reconstruction Finance Corporation Act appearing on page 21 of Exhibit 1 and to the provision therein contained that the R. F. C. was authorized to create in the twelve Federal Land Bank districts a Regional Agricultural Credit Corporation with a paid up capital of not less than $3,000,000 to be subscribed for by the Reconstruction [fol. 14] Finance Corporation and paid for out of the unexpended balance of amounts allocated and made available to the Secretary of Agriculture under Section 2 of the Reconstruction Finance Corporation Act.

Exhibit 2, being the charter of the Regional Agricultural Credit Corporation of Salt Lake City, Utah, executed September 10, 1932, by the Reconstruction Finance Corporation by Atlee Pomerene, Chairman, was offered and introduced in evidence.

Attention was called to Executive Order No. 6084 by Franklin D. Roosevelt, dated March 27, 1933, which will be found in U. S. C. A., Title 12, pages 793 and 794, wherein

A 308

Name of Taxpayer Waldemar Q. Van Cott

Schedule) No. 2

EXPLANATION OF ITEMS

(a) & (b) Salaries received by residents of the State of Utah from the Reconstruction Finance Corporation and Regional Agricultural Credit Corporation and other similar United States Government Special corporations, agencies, instrumentalities and administrations are held to be taxable under the income tax on individuals and regulation issued by the State Tax Commission, provided for in Section 80-14-2, Revised Statutes of Utah, 1933, as amended.

(c) Deduction for proportion of partnership property taxes (amount of $53.50) should be disallowed as partnership taxes were paid and claimed as a deduction on partnership return. Taxes paid by partnership can be taken as a credit not a deduction on individual income tax return by a partner.

Name of Taxpayer Waldemar Q. Van Cott

Schedule No. 3 Year Ended 12-31-35

COMPUTATION OF TAX

(Individual)

Year 1935-~~1934~~

Net Income (from Schedule 1)		$ 10,211.29
Less: Credit for Dependents	$ 600.00	
Personal Exemption	$1200.00	1,800.00
Income Subject to Tax		$ 8,411.29
Tax at 1 per cent on $ 1,000.00		$ 10.00
Tax at 2 per cent on $ 1,000.00		$ 20.00
Tax at 3 per cent on $ 1,000.00		$ 30.00
Tax at 4 per cent on $ 1,000.00		$ 40.00
Tax at 5 per cent on $ 4,411.29		$ 220.56
Total Tax Assessable		$ 320.56
Tax Previously Assessed		$ 3.77
Additional Tax to be Assessed ~~[illegible]~~		$ 316.79
Interest from March 15, 1936 to July 25, 1936		$ 6.93
Total Due		$ 323.72

Price _____

Date May 25, 1936

Re: Waldemar Q. Van Cott

1311 Walker Bank Bldg.

Salt Lake City, Utah

Utah State Tax Commission
118 State Capitol Building
Salt Lake City, Utah

An examination of the ~~"~~ return of the above named taxpayer for the period year 1935 discloses the following in connection with the individual income tax liability:

SUMMARY

Tax Previously Assessed	Adjustments Proposed		Correct Tax Liability	Penalties
	Deficiency	Overassessment		
3.77	316.79		320.56	6.93

Principal causes of changes in tax liability: Taxpayer claimed as deduction salaries paid by Reconstruction Finance Corp. and Regional Agricultural Credit Corp. as exempt, also deduction for proportion of partnership taxes.

Changes discussed with: Mr. Preece

Does taxpayer agree to findings: _____

Other information _____

W. M. Coombs
Examining Officer
#28

006

[fol. 7] BEFORE STATE TAX COMMISSION OF UTAH

Petition for Redetermination of Tax

AMENDED PETITION FOR REDETERMINATION OF INCOME TAX—Filed May 28, 1936

The undersigned is in receipt of a letter from your Body dated May 25, 1936, stating that you propose to adjust my income tax liability for 1935 by including salary and wage receipts on account of services rendered in connection with the operations of Reconstruction Finance Corporation, hereinafter called R. F. C., and Regional Agricultural Credit Corporation of Salt Lake City, Utah, hereinafter called the R. A. C. C.

I hereby petition for a re-determination of the asserted deficiency upon the following grounds:

1. All payments of salary and wages in question have been made to me by the Treasurer of the United States on account of services rendered in connection with the exercise of an essential governmental function rendered by the United States through said R. F. C. and R. A. C. C. and is therefore exempt under the provisions of Section 80-14-4, Revised Statutes of Utah, 1933.

2. The Constitution of the United States creates the United States Government as a sovereign government. It has been decided by the United States Supreme Court that wages and salaries paid by the United States as a sovereign government are not subject to taxation by the various states. R. F. C. and R. A. C. C. are corporations created by the Congress of the United States and serve solely as instrumentalities of the United States. All of the capital stock and property of R. F. C. and R. A. C. C. are owned by the United States and are used for the accomplishment of public and governmental purposes. They are operated and managed under rules and regulations prescribed by the United States, its officers and agents. All expenses, including wages and salaries to me, have been paid by the United States. For these reasons I rely upon the Constitution of the United States as precluding the State of Utah from imposing any tax based upon salaries and wages received from R. F. C. and R. A. C. C.

activities of the R.A.C.C. were supervised by the F.C.A., its financing being done by the R.F.C. out of funds appropriated by Congress and which funds were in the treasury of the United States. The R.A.C.C. has no funds of its own and never has had any. It never has had a bank account. It has authority to draw on the treasury of the United States and officials of the R.A.C.C. who were authorized to sign such drafts did so as disbursing officers of the United States against the treasury of the United States. All funds of the R.A.C.C. are allocated and appropriated by Act of Congress. R.A.C.C. each year is required to make up in advance its budget for the forth coming fiscal year and to forward such for consolidation with the budget of the United States Government.

Compensation to Mr. Van Cott for his legal services as counsel for the R.A.C.C. has been paid by checks drawn on the treasury of the United States.

The R.A.C.C. was created in 1932 as an emergency organization and had a life of only five years to begin with. Its purpose was to make emergency loans to assist agriculturalists and livestock men during the emergency then existing in 1932 and through 1933. It was an emergency corporation set up only for that specific purpose. It was never con- [fol. 26] templated that it would continue indefinitely as a going concern. After the creation of the Farm Credit Administration in May 1933 the need for the activities of the R.A.C.C. was diminished and finally came to an end. Early in 1934 the R.A.C.C. ceased to make loans. It has made no further loans and so far as I know will make no further loans. It is liquidating, disbursing no funds except for the protection of its collateral.

Its loans are almost exclusively to livestock men; a few for crop production but mostly on sheep and cattle. That is the character of loans made through the Salt Lake office. Other phases of the R. A. C. C., such as the California office, loaned on something in excess of one hundred varieties of fruits, vegetables and various farm production crops. In the South loans were made by the R. A. C. C. on cotton, tobacco and various other crops of that type. As the R. A. C. C. liquidates pursuant to the instructions of the Farm Credit Administration the proceeds of liquidation are paid into the treasury of the United States through the Federal Reserve Bank in this district. Thereafter the R. A. C. C. has no power to draw on those funds for any purpose

whatever. We have no power to draw on any funds except such as are set up in the budget which since the commencement of liquidation are purely expense items, except those for protection of collateral pledged under presently held loans.

Other sections of the Farm Credit Administration are the Federal Land Banks, the Land Bank Commissioners, the Federal Intermediate Credit Banks, the Production Credit Association and their subsidiaries, the Production Credit [fol. 27] Associations, the Bank for Cooperatives and the temporary activities of the Emergency Crop and Feed Loan Section, the Federal Credit Unions and the Farm Mortgage Corporations. The various divisions of the Farm Credit Administration were set up under Section 636 of the United States Code Annotated, Title 12, Annual Supplement Section 636, page 181, which provides that the governor of the Farm Credit Administration is authorized to carry out the powers and duties theretofore or thereafter vested in him, or the Farm Credit Administration, by law or under any executive order, to establish and fix the powers and duties of such divisions, agencies, corporations and instrumentalities as he deems necessary to the efficient financing of the Farm Credit Administration and the successful execution of the powers and duties so vested in the Farm Credit Administration. The R. A. C. C. was brought under the F. C. A. pursuant to that statute.

On paper, at the present time, the R. A. C. C. of Salt Lake City shows a profit on its operations. If there is such eventually it will go into the treasury of the United States.

The R. A. C. C. of Salt Lake City has not engaged in any activities other than those of a lending agency.

In hardly any cases were our loans disbursed directly to the individual borrowers. In practically all cases the loans were disbursed to banks and other lending agencies that were hard pressed for liquid assets at that time.

The R. A. C. C. came into existence in the latter part of 1932 and loaned millions which resulted in taking over loans theretofore held by banks. The R. A. C. C. never went out and solicited loans, nor did it accept any applica- [fol. 28] tions for loans from borrowers able to secure funds elsewhere. The R. A. C. C. never made a loan except emergency loans which were necessary for the preservation of the industry or the safeguarding of the assets of banks or other loaning agencies. The R. A. C. C. was set up solely

as an emergency organization to meet the need and demand of the public at that time and as soon as the emergency passed and other agencies were capable of taking care of the needs of the industry and the banks, the R. A. C. C. refused to make any further loans and went into liquidation. At the present time much of the money that the R. A. C. C. is being paid and which is being turned over by it to the treasury of the United States is coming from the very banks from whom the R. A. C. C. took the loans in the first place. In 1932 and 1933 the R. A. C. C. put money from the treasury of the United States out in the local banks and took as collateral mortgages on sheep and cattle that had been held as collateral in those banks. Now the banks are coming back to the R. A. C. C. and taking over those loans, paying it the amount owing to it, which goes into the treasury of the United States.

It was a bailing-out process. The banks did not remain liable after the R. A. C. C. made a new loan and thus refinanced. In many cases there was a scaling down of the debt owing to the bank and the bank either took a loss or a second mortgage. The price of livestock had gone down so terribly low that the loan value was not sufficient to refinance the loan as it existed with the banks. The R. A. C. C. would loan what it was justified in lending on the loan value of the livestock. The bank would take that cash and a second mortgage for the balance.

A considerable part of the $5,000,000.00 advanced to the [fol. 29] R. A. C. C. by the R. F. C. has been repaid. These repayments of capital are by special check to the R. F. C. If eventually the R. A. C. C. does not receive enough to retire all of the stock held by the R. F. C. there will be a loss to the United States Government. If there is enough, the R. F. C. will come out even and if there is more than enough there will be a surplus which will go to the United States government.

The capital of the R. A. C. C. was $5,000,000.00. It has loaned $40,000,000.00. The excess of $35,000,000.00 has been financed by rediscounting paper with the R. F. C. or the Federal Intermediate Credit Bank.

This stipulation shall be made part of the transcript of the record.

Dated Nov. 1, 1938.

W. Q. Van Cott, Attorney for Plaintiff. Alfred Klein, Attorney for Defendants.

[fol. 30] EXHIBIT 2

Charter of Regional Agricultural Credit Corporation of Salt Lake City, Utah

Washington, D. C.,
September 10, 1932.

Whereas, the Reconstruction Finance Corporation deems it desirable to create a regional agricultural credit corporation in Federal Land Bank District Number Eleven, comprising the States of Utah, Nevada, California and Arizona, and with its principal office in the City of Salt Lake City, State of Utah.

Now, Therefore, The Reconstruction Finance Corporation does hereby create, and grant this charter to, the Regional Agricultural Credit Corporation of Salt Lake City, Utah; and said Regional Agricultural Credit Corporation of Salt Lake City, Utah, is hereby authorized and empowered to do and perform all acts and transact all business which, by implication or otherwise, is permitted legally to be done, performed and transacted by a regional agricultural credit corporation, under and in accordance with the act of Congress, approved July 21, 1932, known as the "Emergency Relief and Construction Act of 1932," and to do all other things incidental thereto, and necessary or appropriate in connection therewith, within the States of Utah, Nevada, California and Arizona, and within such other state or states, or parts thereof, as the Reconstruction Finance Corporation, acting by and through its Board of Directors, may at any time and from time to time prescribe or permit.

Said Regional Agricultural Credit Corporation of Salt Lake City, Utah, shall be managed by officers and agents appointed by the Reconstruction Finance Corporation, under such rules and regulations as the Board of Directors of the Reconstruction Finance Corporation may prescribe, which Board of Directors shall also prescribe the provisions of the by-laws of the Regional Agricultural Credit Corporation of Salt Lake City, Utah.

In Witness Whereof, The Reconstruction Finance Corporation has caused this charter to be signed by its executive officer, Chairman of its Board of Directors, attested by its Secretary, and has caused its seal to be hereunto affixed this 10th day of September, 1932.

Reconstruction Finance Corporation, by Atlee Pomerene, Chairman.

Attest: G. R. Cooksey, Secretary. (Seal.)

Exhibit II-A

RECONSTRUCTION FINANCE CORPORATION

SUMMARY OF THE ACTIVITIES OF
THE RECONSTRUCTION FINANCE CORPORATION
AND ITS CONDITION AS OF DECEMBER 31, 1935

JANUARY 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1936

the President of the United States transferred jurisdiction over the Regional Agricultural Credit Corporations from the Reconstruction Finance Corporation to the Farm Credit Administration and changed the name of the Federal Farm Board, as it had been theretofore, to Farm Credit Administration and changed the name of the Chairman of the Federal Farm Board to the Governor of the Farm Credit Administration and transferred to the Farm Credit Administration the functions of the Reconstruction Finance Corporation as follows:

"The functions of the Reconstruction Finance Corporation and its Board of Directors relating to the appointment of officers and agents to manage regional agricultural credit corporations formed under section 201 (e) of the Emergency Relief and Construction Act of 1932; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof."

Attention was called to Section 636, Title 12, U. S. C. A., authorizing the Governor of the Farm Credit Administration to establish such divisions of the Farm Credit Administration as he saw fit.

A bulletin, dated May 25, 1933, wherein the functions of the R. F. C. in the direction of the R. A. C. C. was transferred to the Farm Credit Administration was marked Exhibit 3 and introduced in evidence.

For legal services rendered the R. F. C. I have been paid, since May, 1932, a fixed monthly amount to cover all services rendered. These services have been rendered under the direction, supervision and control of the Board of Directors of the R. F. C., its General Counsel and its General Solicitor. [fol. 15] None of such services have been rendered by me as an independent contractor.

Services for the R. A. C. C. have not been rendered for a fixed monthly or annual fee but have been rendered for a designated amount per day. These services have been rendered under the direction, supervision and control formerly of the General Counsel of the Reconstruction Finance Corporation and after the transfer of jurisdiction to the Farm Credit Administration under the General Counsel and General Solicitor of the Farm Credit Administration. None of such services have been rendered as an independent contractor.

It is hereby stipulated that the foregoing seven pages constitute a full, true and correct record of the proceedings had and statements and evidence introduced at the said hearing.

Dated April 29, 1937.

(S.) W. Q. Van Cott, (S.) Ned Warnock, Attorney-for State Tax Commission of the State of Utah.

[fol. 16] IN SUPREME COURT OF UTAH

W. Q. VAN COTT, Plaintiff,

vs.

THE STATE TAX COMMISSION OF UTAH and IRWIN ARNOVITZ, R. E. Hammond, H. P. Leatham and J. Will Knight, Members Thereof, Defendants

STIPULATION REGARDING PRAECIPE FOR AND TRANSCRIPT OF RECORD

The above named parties, for the purpose of reducing the transcript of the record insofar as possible, hereby stipulate as follows:

1. Exhibit I, referred to in the stipulation in the above entitled case dated April 29, 1937, is a pamphlet consisting of ninety-eight printed pages, printed by the United States Government Printing Office, dated October, 1935 and entitled, "Reconstruction Finance Corporation Act as Amended and Other Laws and Documents Pertaining to Reconstruction Finance Corporation." The contents of this exhibit, insofar as they are applicable, are all statutes of the United States known to the United States Supreme Court and insofar as deemed necessary will be referred to in the briefs and the exhibit may be omitted from the transcript of the record.

2. Exhibit I-A is a pamphlet consisting of twenty-one pages, printed in February, 1936 by the United States Government Printing Office, entitled "Reconstruction Finance Corporation—Its Powers and Functions—Circular No. 4 (Revised)," and is a summarization and analysis of the statutes of the United States which wholly govern the Reconstruction Finance Corporation as to its powers and func-

tions. Insofar as these are applicable, reference will be [fol. 17] made to them in the briefs and the exhibit may be omitted from the transcript of the record.

3. Exhibit II-A, Exhibit 2 and Exhibit 3 are to be made part of the record as part of the said stipulation of April 29, 1937.

4. The stipulation dated April 29, 1937, in the second paragraph thereof, states "* * * the parties hereby stipulate that the following is a correct description of the statements there made (that is to say at the first hearing before the Tax Commission on June 29, 1936) and together with the transcript of the further hearing on August 4, 1936, certified to by the reporter, E. M. Garnett, who took such further proceedings, constitute a full record of all of the statements, evidence and proceedings had in such hearings." The said transcript of the further hearing on August 4, 1936, certified to by the reporter, which is part of the record in the above entitled case, contains much that is argument and reference to various laws. The parties hereby stipulate that the following is a full and complete narrative of all of the evidence introduced at such further hearing, may be included in the transcript of the record as a full substitute for such transcript of the further hearing on August 4, 1936 and that the full transcript of the further hearing on August 4, 1936 may be omitted from the transcript of the record.

At the further hearing on August 4, 1936 W. Q. Van Cott was duly sworn and testified as follows:

There are actually no funds in the Reconstruction Finance Corporation or in the Regional Agricultural Credit Corporation. They do not have any funds that are theirs. It is simply in the beginning the congressional Act appropriated for the Reconstruction Finance Corporation so many million of dollars—five hundred million dollars. That was nothing but a credit in the treasury of the United States, [fol. 18] and wherever the Reconstruction Finance Corporation has expended money from that day to this it does so only by drawing a check on the treasury of the United States. There is set up, as Mr. Underhill will explain, a budget annually for the needs of the Reconstruction Finance Corporation, the needs of the Regional Agricultural Credit Corporation. They go in the budget of the United States

Government, and whenever they make expenditures they simply draw on the treasury of the United States. For example, I am paid for my services for the Regional Agritural Credit Corporation by check drawn, by the Assistant Treasurer, I suppose, of the Regional Agricultural Credit Corporation on the treasury of the United States, that check being numbered—what is the number of that check?

Mr. Underhill: 93-361.

Mr. Van Cott: 93-361. That is the expense account of the Regional Agricultural Credit Corporation.

Now to answer your question in respect to other kinds of loans. Take for example the loans that the Reconstruction Finance Corporation makes on apartment houses and hotels; that has been one of its most active functions during the past several months. Those funds are disbursed through the Federal Reserve Bank at San Francisco through the Salt Lake branch to the individual borrower. That has been the method of disbursement of all the funds through the Salt Lake Agency of the Reconstruction Finance Corporation. A credit is established by the treasury of the United States, through the act of the Treasurer of the Reconstruction Finance Corporation, with the Federal Reserve Bank. The Federal Reserve Bank sends on the actual funds to be disbursed. And that was true also [fol. 19] of all subscriptions made by the Reconstruction Finance Corporation to the preferred stock of banks and to the debentures of banks.

In the case of the Salt Lake office of the R. A. C. C. alone it has loaned twenty million dollars and has liquidated to the extent of about eighteen million dollars. That is true of that sort of loans. When it comes to the advances that I described at the last hearing of the several hundred thousand dollars that were paid by the Reconstruction Finance Corporation to the Governor of the State of Utah back in 1932 for the relief of destitution, that was not a loan at all. That was simply a payment to him and he was to use that for the relief of destitution. That is true also in a great many others of these advances. For example, advances for the relief of flood, earthquake disasters; those are not loans.

Here is another thing that Mr. Underhill will point out to you, that is the Regional Agricultural Credit Corporation has liquidated this thirty seven million out of forty million dollars it has advanced. That money goes to the treasury of the United States unearmarked.

On page 15 of Exhibit II-A will be found reference to distributions to depositors in closed banks through reorganization and liquidation. In the case of Utah there was authorized for that purpose over $3,000,000.00. There was disbursed almost $1,000,000.00 and there has been repaid about a quarter of a million dollars.

All of Utah is in the jurisdiction of the Salt Lake Agency. All of those funds have been handled, so far as legal details, under my direction. That is true also of the eastern tier of counties in Nevada. The whole amount authorized for the State of Nevada was $1,690,000.00, of which there has [fol. 20] been disbursed almost the entire amount and repaid almost $1,000,000.00. I cannot say how much of that has been disbursed under the jurisdiction of the Salt Lake Agency, but part of it at least. In Idaho the amount authorized was $3,600,000.00. There has been disbursed $3,200,000.00 and there has been repaid $1,700,000.00.

On page 16 of Exhibit II-A reference is made to purchases of preferred stock, capital notes and debentures in banks and trust companies. In Utah the amount authorized was $4,300,000.00, the amount purchased $3,900,000.00 and the amount repaid $900,000.00. All of the legal details of those purchases were handled by me as Agency Counsel. That is true also of amounts shown on page 16 of Exhibit II-A for Idaho and Nevada insofar as they were within the territory of the Salt Lake Agency.

During 1932 there were several hundred thousand dollars paid by the Reconstruction Finance Corporation to the Governor of the State of Utah for relief purposes. There was no obligation on the part of the State of Utah to repay any part of this.

The Salt Lake Agency of the Reconstruction Finance Corporation commenced functioning in February, 1932, and during that time until the end of 1932 the Salt Lake Agency disbursed only one kind of loan. They were all loans to banks. These were made to banks in Utah, the Southern half of Idaho and the eastern tier of counties in Nevada. There was at that time a growing bank emergency. Banks that had been considered absolutely sound in 1928 and 1929, and which were in fact sound, found their assets which had normally been sufficiently liquid, frozen; and at the same time banks were being drained by depositors. There was a [fol. 21] growing apprehension on the part of depositors

and they were draining those banks through all this territory, and these loans were made on those frozen assets for the purpose of making the banks liquid so that they could meet the demands that were made upon them. In all such loans the collateral, under the direction of the Board of Directors of the Reconstruction Finance Corporation in Washington, was deposited with the designated custodian, the Federal Reserve Bank of San Francisco, Salt Lake City Branch. All notes were handled through that bank and all collateral deposited with it as custodian.

I did, however, handle certain matters for the Reconstruction Finance Corporation which were not handled through the Salt Lake Agency. What I have said about loans to banks was in connection with the agency itself. The handling of the legal details and advances made by the Reconstruction Finance Corporation to the Governor of the State of Utah for relief of destitution were not made through the Agency. I would receive letters and copies of letters from the Reconstruction Finance Corporation in Washington, directing me to participate in the legal details in the making of those advances and from my files I would be able to say exactly how much those advances amounted to. One other thing I did that was aside from the activities of the Salt Lake Agency was a direct loan to a concern called the Riverton Pipe Line Company. This loan was authorized directly by Washington, not through the Salt Lake Agency, and I attended to the legal details of that loan.

After the banks were closed in March, 1933 the United States Government, through the Reconstruction Finance [fol. 22] Corporation, commenced the rehabilitation of the capital structures of banks and from that time on until well into 1934 the great bulk of the work of the Salt Lake Agency was the purchase of preferred stock in national banks in our territory and also preferred stock in state banks in Idaho and Nevada. In Utah we have a constitutional provision which imposes double liability upon the owners of all bank stock. The Reconstruction Finance Corporation was, of course, unwilling to own stock under those circumstances, and accordingly the legislature of the State of Utah in 1933 passed statutes authorizing banks to borrow money on their debentures, and so in Utah State banks were rehabilitated through the sale of debentures. In Utah a total of almost $4,000,000.00 was disbursed by the Salt Lake Agency

for the purpose of rehabilitating the capital structures of national and State banks. All of the legal details of these were handled by me.

The activity of the Reconstruction Finance Corporation in Utah since it discontinued advancing money for the relief of destitution in 1932 has been that of a lending agency but not commercial lending at all. The whole purpose of the Reconstruction Finance Corporation through the Salt Lake Agency has been the effort by the Federal Government to relieve the banking emergency, to prevent the closing of banks; after the banks had been closed to rehabilitate the financial structure of the banks. The Reconstruction Finance Corporation, through the Salt Lake Agency, has also made quite a large number of direct loans to industry. The purpose was to increase employment. The thought of the Federal Government was that a lot of industries had closed up or were on the point of closing up and loans were made [fol. 23] to get funds into the industries so that employment would be possible.

The Federal Government also made loans through the Salt Lake Agency to relieve mortgagors of hotels and apartment houses. Many of these were facing foreclosure and loss of property. Some of these loans were made even after foreclosure and the passage of title.

The Reconstruction Finance Corporation also made efforts to aid the livestock industry and the banks which carried loans by the livestock industry. The banks in this part of the country had a tremendous amount of livestock paper. There had been a severe shrinkage in value of mortgaged livestock. The banks needed to be liquid. In consequence of shrinkage in value of mortgaged livestock they were very unliquid. The only way they could liquidate would be to foreclose and wipe out the livestock industry. The first effort to relieve this situation involved the setting up of livestock loan companies. Thus, in the jurisdiction of the Salt Lake Agency the Bankers Livestock Loan Company was created. This secured funds from the Reconstruction Finance Corporation and loaned them to livestock operators upon the security of chattel mortgages, the funds actually almost invariably going into banks in payment of prior chattel mortgages. This was very unsatisfactory because the capital originally provided by the banks had to be secured from the livestock borrowers who were compelled to subscribe 10% of each loan to the capital stock of

the Bankers Livestock Loan Company. This unsatisfactory feature was really the reason that led to the creation of the Regional Agricultural Credit Corporations.

[fol. 24] E. R. UNDERHILL, being first duly sworn, testified as follows:

My name is E. R. Underhill. I am manager of the Salt Lake City Branch of the Regional Agricultural Credit Corporation of Salt Lake City, Utah. I have been connected with this corporation since its beginning, originally as Secretary-Treasurer, later becoming manager of the Salt Lake City Branch. At the time of the organization of the Regional Agricultural Credit Corporation of Salt Lake City in 1932 there was a single stock certificate issued in the amount of $3,000,000.00 for all of the stock of the Regional Agricultural Credit Corporation of Salt Lake City, Utah. This was in favor of the Reconstruction Finance Corporation which had furnished the $3,000,000.00. In 1933 we issued another stock certificate for $2,000,000.00 in exchange for an additional $2,000,000.00 paid to us by the Reconstruction Finance Corporation.

The R.A.C.C. was organized pursuant to Act of Congress in 1932 as a subsidiary of the Reconstruction Finance Corporation, chartered under the Act of Congress and set up as a corporation, its stock being owned entirely by the Reconstruction Finance Corporation. All of the activities of the R.A.C.C., its loans, disbursements, operations, including expenditures were supervised directly by the Reconstruction Finance Corporation through the remainder of 1932 and the fore part of 1933. In May, 1933 supervision of the R.A.C.C. was taken over by the Farm Credit Administration. The stock of the R.A.C.C. is to this day owned by the R.F.C. At the time of the formation of the Farm Credit Administration, which is known as the F.C.A., there was taken into it the twelve Federal Land Banks, the twelve Inter-[fol. 25] mediate Credit Banks, the twelve Production Credit Corporations, one Central Bank for Cooperatives and twelve District Banks for Cooperatives and the Federal Farm Mortgage Corporation. In addition the twelve Regional Agricultural Credit Corporations created by the Reconstruction Finance Corporation, pursuant to Act of Congress, were placed under the supervision of the Farm Credit Administration effective on May 27, 1933. Thereafter the

RECEIPTS AND DISBURSEMENTS DURING THE YEAR 1935

RECEIPTS	
From repayments on loans (including $1,576,565.78 on loans secured by preferred stock of banks)	$568,567,280.82
From retirement of preferred stock, capital notes, and debentures	64,387,543.93
From sale of P. W. A. securities	111,125,779.54
From relief advances, 1932 act	1,146,942.00
From advances and other reimbursable items	2,864,307.93
From interest	68,607,752.13
From dividends on preferred stock	20,608,692.87
From regional agricultural credit corporations as reductions of capital and for deposit	19,030,000.00
From The RFC Mortgage Company for deposit	9,998,500.00
From miscellaneous sources, including suspended credits (principal and interest approximately $26,000,000)	49,898,876.34
Total receipts in ordinary activities of corporation	916,235,675.56
From sale of notes:	
To Secretary of the Treasury	730,000,000.00
To institutions whose preferred stock, capital notes, or debentures were purchased by the Corporation and to holders of notes originally sold to such institutions	219,887,666.67
Total receipts	1,866,123,342.23
DISBURSEMENTS	
Loans on cotton, corn, tobacco, and other commodities	272,916,825.62
Loans for distribution to depositors in closed banks	114,849,398.54
Loans to receivers of building and loan associations	956,330.94
Loans to railroads (including receivers)	39,933,552.00
Loans to drainage, levee, and irrigation districts	37,805,506.85
Loans to industrial and commercial businesses, including fishing, mining, milling, and smelting	37,200,760.29
Loans on preferred stock in banks	2,277,905.00
Loans on preferred stock in insurance companies	150,000.00
Loans for all other purposes	91,331,222.41
Purchase of stock of The RFC Mortgage Company	10,000,000.00
Purchases of preferred stock in banks	85,838,883.33
Purchases of capital notes and debentures in banks	14,852,500.00
Purchases of securities from P. W. A.	263,721,733.77
Advances and other reimbursable items	3,438,283.42
Regional agricultural credit corporations (transfer of capital from one regional to another)	9,030,000.00
Interest paid on notes sold to Secretary of the Treasury	47,370,483.66
Interest paid on notes sold to financial institutions	5,539,595.03
Operating expenses	10,792,689.38
Miscellaneous disbursements	16,050,430.03
Total disbursed in ordinary activities of Corporation	1,064,056,100.27
Disbursed to other governmental agencies and for direct relief	360,107,174.14
Disbursed for payment of notes issued:	
To Secretary of the Treasury	220,000,000.00
To financial institutions	216,764,666.67
Total disbursements	1,860,927,941.08

TOTAL ALLOCATIONS TO OTHER GOVERNMENTAL AGENCIES AND FOR DIRECT RELIEF FROM FEB. 2, 1932, THROUGH DEC. 31, 1935

	Amount allocated	Amount disbursed
Secretary of Agriculture for crop loans	$115,000,000.00	$115,000,000.00
Capital of regional agricultural credit corporations (reallocated from amount originally allocated to Secretary of Agriculture—includes $10,000,000 held in revolving fund)	44,500,000.00	44,500,000.00
Governor of Farm Credit Administration (reallocated from amount originally allocated to Secretary of Agriculture)	40,500,000.00	40,500,000.00
Total originally allocated to Secretary of Agriculture for crop loans	200,000,000.00	200,000,000.00
Regional agricultural credit corporations for expenses prior to May 27, 1933	3,108,397.63	3,108,397.63
Regional agricultural credit corporations for expenses since May 26, 1933	12,640,000.00	10,240,960.63
Secretary of the Treasury to pay for capital of Federal Home Loan banks	124,741,000.00	94,395,700.00
Land bank commissioner to make loans to joint stock land banks	100,000,000.00	2,600,000.00
Land bank commissioner to make loans to farmers ($200,000,000 original allocation reduced by reallocation to Federal Farm Mortgage Corporation)	145,000,000.00	145,000,000.00
Federal Farm Mortgage Corporation to make loans to farmers (reallocated from $200,000,000 originally allocated to land bank commissioner)	55,000,000.00	55,000,000.00
Secretary of the Treasury to pay for capital of Home Owners' Loan Corporation	200,000,000.00	200,000,000.00
Federal Housing Administrator (amount stated is amount disbursed; total allocation not limited to specific amount)	39,000,000.00	39,000,000.00
Total to other governmental agencies by direction of Congress	879,489,397.63	749,345,058.26
For direct relief under Emergency Relief and Construction Act of 1932	300,000,000.00	299,984,999.00
For direct relief under Federal Emergency Relief Act of 1933	500,000,000.00	499,988,203.59
For direct relief under Emergency Appropriation Act, fiscal year 1935	500,000,000.00	500,000,000.00
For direct relief under Emergency Relief Appropriation Act, 1935	500,000,000.00	300,000,000.00
Total allocations for direct relief by direction of Congress	1,800,000,000.00	1,599,973,202.59
Total allocations to other governmental agencies and for direct relief	2,679,489,397.63	2,349,318,260.85
Interest on notes issued for funds for allocations and relief advances	17,889,932.90	17,410,245.40
Total	2,697,379,330.53	2,366,728,506.25

COMPARATIVE STATEMENT OF CONDITION

	Dec. 31, 1933	Dec. 31, 1934	Dec. 31, 1935
ASSETS			
Cash on deposit with Treasurer of United States	$6, 657, 256. 44	$6, 117, 074. 10	$11, 312, 475. 25
Cash held by Federal Reserve banks as collateral	5, 056, 007. 01	44, 523. 27	227, 519. 30
Loans outstanding	1, 709, 602, 422. 70	1, 846, 174, 710. 19	1, 847, 694, 566. 43
Preferred stock, capital notes and debentures of banks and 1 insurance company	249, 900, 816. 67	846, 059, 741. 97	881, 859, 858. 80
Securities purchased from Federal Emergency Administration of Public Works		1, 528, 609. 70	154, 001, 021. 92
Capital stock of The RFC Mortgage Company			10, 000, 000. 00
Advances for relief under 1932 Relief Act, to municipalities and political subdivisions of States, including Puerto Rico	18, 989, 396. 00	17, 748, 072. 00	16, 601, 130. 00
Allocations to other governmental agencies, advances for relief under 1932 and 1933 relief acts and emergency appropriation acts, 1935, and interest on money borrowed to make allocations and relief advances	985, 196, 893. 22	1, 984, 561, 253. 48	2, 347, 248, 712. 75
Advances for care and preservation of collateral and other reimbursable expense	1, 244, 534. 93	674, 957. 15	998, 025. 17
Accrued interest and dividends	32, 874, 584. 65	42, 692, 269. 83	43, 112, 228. 98
Gold	78, 833, 860. 73		
Other assets	2, 373, 017. 17	2, 442, 672. 53	3, 825, 433. 52
Total	3, 090, 728, 791. 54	4, 448, 043, 884. 22	5, 016, 881, 072. 12
LIABILITIES			
Notes	2, 530, 025, 854. 04	3, 834, 335, 636. 67	4, 347, 459, 666. 67
Accrued interest	4, 819, 727. 98	8, 962, 212. 89	9, 693, 354. 04
Liability for funds held as cash collateral	5, 381, 830. 86	341, 699. 80	396, 383. 17
Liability for funds held for The RFC Mortgage Company			9, 042, 664. 25
Remittances not credited on borrowers' indebtedness	7, 541, 601. 95	21, 326, 208. 25	19, 837, 378. 73
Unearned interest and discount	982, 914. 20	13, 287. 58	151, 241. 09
Other liabilities	118, 570. 81	692, 450. 53	14, 436, 164. 20
Capital stock	500, 000, 000. 00	500, 000, 000. 00	500, 000, 000. 00
Surplus (adjusted)	41, 858, 291. 00	82, 371, 358. 52	115, 844, 219. 97
Total	3, 090, 728, 791. 54	4, 448, 043, 884. 22	5, 016, 881, 072. 12
MEMORANDUM			
Undisbursed authorizations and commitments to make loans, purchase preferred stock, capital notes and debentures, etc	1, 627, 436, 606. 27	1, 158, 813, 982. 50	1, 083, 965, 802. 00
Undisbursed allocations to other governmental agencies (including advances under 1933 and 1935 relief acts)	634, 084, 793. 03	173, 762, 047. 51	330, 156, 135. 78
Total	2, 261, 521, 399. 30	1, 332, 576, 030. 11	1, 414, 121, 937. 78

LOANS, INVESTMENTS, AND ALLOCATIONS DISBURSED AND REPAID

FROM FEB. 2, 1932, THROUGH DEC. 31, 1935, AND BALANCES OUTSTANDING AT DEC. 31, 1935

	Disbursed	Repaid	Balance outstanding Dec. 31, 1935
Loans on cotton, corn, tobacco, and other commodities	$595, 572, 969. 92	$305, 785, 477. 87	$289, 787, 492. 05
Loans for distribution to depositors in closed banks	876, 124, 844. 81	630, 399, 741. 51	245, 725, 103. 30
Loans to receivers of building and loan associations	2, 000, 189. 96	1, 325, 178. 58	675, 011. 38
Loans to railroads (including receivers)	487, 216, 824. 11	90, 966, 963. 21	396, 249, 860. 90
Loans to drainage, levee, and irrigation districts	50, 103, 730. 81	78, 847. 58	50, 024, 883. 23
Loan to Chicago Board of Education to pay teachers' salaries	22, 300, 000. 00	22, 300, 000. 00	----------
Loans to industrial and commercial businesses, including fishing, mining, milling, and smelting	43, 968, 885. 60	2, 409, 178. 55	41, 559, 707. 05
Loans to banks and trust companies	1, 142, 590, 240. 69	975, 587, 748. 53	167, 002, 592. 16
Loans to Federal land banks	387, 236, 000. 00	342, 162, 053. 76	45, 073, 946. 24
Loans to mortgage loan companies	[1] 223, 321, 144. 12	[1] 125, 392, 894. 55	97, 928, 249. 57
Loans to aid in financing self-liquidating construction projects (including loans for the repair and reconstruction of property damaged by earthquake, fire, tornado, and cyclone)	192, 608, 981. 36	45, 045, 886. 29	147, 563, 095. 07
Loans to regional agricultural credit corporations	173, 243, 640. 72	173, 243, 640. 72	----------
Loans to building and loan associations	114, 441, 060. 54	107, 756, 737. 29	6, 684, 323. 25
Loans to insurance companies	89, 519, 494. 78	83, 059, 038. 37	6, 460, 456. 39
Loans to joint-stock land banks	15, 809, 372. 29	13, 512, 460. 36	2, 296, 911. 93
Loans to livestock credit corporations	13, 101, 598. 69	12, 114, 955. 61	986, 643. 08
Loans to Federal intermediate credit banks	9, 250, 000. 00	9, 250, 000. 00	----------
Loans to State funds created to insure deposits of public moneys	10, 764, 631. 18	9, 985, 827. 13	778, 804. 05
Loans to agricultural credit corporations	5, 562, 890. 94	4, 802, 954. 02	759, 936. 92
Loans to credit unions	600, 095. 79	271, 825. 63	328, 270. 16
Loans to processors or distributors for payment of processing taxes	14, 718. 06	14, 718. 06	----------
Loans on preferred stock in banks	20, 939, 230. 00	3, 212, 950. 30	17, 726, 279. 70
Loans on preferred stock in insurance companies	30, 275, 000. 00	192, 000. 00	30, 083, 000. 00
Purchase of capital stock in The RFC Mortgage Company	10, 000, 000. 00	----------	10, 000, 000. 00
Purchase of preferred stock in 1 insurance company	100, 000. 00	----------	100, 000. 00
Purchases of preferred stock in banks	[2] 679, 834, 809. 23	[2] 36, 566, 470. 00	643, 268, 339. 23
Purchases of capital notes and debentures in banks	340, 199, 300. 00	101, 707, 780. 43	238, 491, 519. 57
Purchases of securities from P. W. A	293, 948, 410. 01	139, 947, 388. 09	154, 001, 021. 92
	5, 830, 648, 163. 59	3, 237, 092, 716. 44	2, 593, 555, 447. 15
Allocations to other governmental agencies by direction of Congress	766, 755, 303. 66	----------	766, 755, 303. 66
Allocations for direct relief by direction of Congress	1, 599, 973, 202. 59	3, 358, 351. 00	1, 596, 614, 851. 59
Total	8, 197, 376, 669. 84	3, 240, 451, 067. 44	4, 956, 925, 602. 40

[1] Includes $4,798,528.97 disbursed to and $77,546.26 repaid by The RFC Mortgage Company.
[2] Includes $12,500,000 disbursed to the Export-Import Banks of Washington, D. C., and $2,500,000 repaid by the Second Export-Import Bank of Washington, D. C.

EARNINGS AND EXPENSES

FOR THE YEAR 1934

Income:		
Interest and dividends earned on loans on and purchases of preferred stock, capital notes and debentures of banks (collected and accrued)	$31, 061, 267. 34	
Other interest and dividends earned (collected and accrued)	62, 993, 778. 00	
Other income	1, 164, 011. 75	
		$95, 219, 057. 09
Expense:		
Interest paid and accrued on notes issued:		
To Secretary of the Treasury	45, 512, 723. 95	
To financial institutions	5, 491, 290. 17	
Other interest	4, 555. 64	
Operating expenses	10, 737, 625. 88	
		61, 746, 195. 64
Earnings above interest and expenses		33, 472, 861. 45

EARNINGS AND EXPENSES

FEB. 2, 1932, THROUGH DEC. 31, 1934

Income:		
Interest and dividends earned on loans on and purchases of preferred stock, capital notes and debentures of banks (collected and accrued)	$62, 030, 544. 56	
Other interest and dividends earned (collected and accrued)	230, 487, 369. 21	
Other income	1, 530, 732. 47	
		$294, 048, 646. 24
Expense:		
Interest paid and accrued on notes issued:		
To Secretary of the Treasury	[1]134, 574, 285. 26	
To financial institutions	10, 498, 550. 06	
Other interest	28, 385. 25	
Operating expenses	33, 103, 205. 70	
		178, 204, 426. 27
Earnings above interest and expenses		115, 844, 219. 97

[1] Does not include $17,889,932.90 interest on money borrowed for advances to other governmental agencies and for relief.

LOANS, INVESTMENTS, AND ALLOCATIONS AUTHORIZED

PRIOR TO MAR. 4, 1933, AND AFTER MAR. 4, 1933

	Feb. 2, 1932, through Mar. 3, 1933	Mar. 4, 1933, through Dec. 31, 1935
Loans on cotton, corn, tobacco, and other commodities		$1,153,311,524.19
Loans for distribution to depositors in closed banks	$55,495,722.87	1,073,293,228.35
Loans to receivers of building and loan associations	96,738,510.05	23,157,069.21
Loans to railroads (including receivers)	359,885,015.00	310,257,477.00
Loans to drainage, levee, and irrigation districts		121,153,518.84
Loan to Chicago Board of Education to pay teachers' salaries		22,500,000.00
Loans to industrial and commercial businesses (including fishing, mining, milling, and smelting)		115,133,506.85
Loans to banks and trust companies	1,101,633,338.98	248,411,481.75
Loans to Federal land banks	29,000,000.00	370,636,000.00
Loans to mortgage-loan companies	101,065,313.57	[1] 281,684,220.67
Loans to aid in financing self-liquidating construction projects (including loans for the repair and reconstruction of property damaged by earthquake, fire, tornado, and cyclone)	180,041,006.44	114,416,048.42
Loans to regional agricultural credit corporations	46,400,396.22	132,440,056.26
Loans to building and loan associations	107,953,328.92	13,894,315.12
Loans to insurance companies	93,674,931.66	9,175,926.62
Loans to joint stock land banks	8,056,822.68	13,248,750.00
Loans to livestock credit corporations	13,313,302.85	1,445,525.03
Loans to Federal intermediate credit banks		9,250,000.00
Loans to State funds created to insure deposits of public moneys		10,787,715.88
Loans to agricultural credit corporations	3,981,404.16	2,058,736.15
Loans to credit unions	482,001.00	160,966.80
Loans to processors or distributors for payment of processing taxes		26,089.27
Loans on preferred stock in banks		26,227,455.00
Loans on preferred stock in insurance companies		34,275,000.00
Purchase of capital stock in mortgage companies		[2] 22,000,000.00
Purchase of preferred stock in 1 insurance company		100,000.00
Purchases of preferred stock in 4,134 banks		[3] 832,852,934.00
Purchases of capital notes and debentures in 2,847 banks		435,177,780.41
Purchases of securities from P. W. A.		344,658,110.01
Allocations to other governmental agencies and for direct relief	2,197,721,094.40	5,721,733,435.83
Total	589,715,474.80	2,107,663,855.73
	2,787,436,569.20	7,829,397,291.56

[1] Includes $25,000,000 to The RFC Mortgage Company.
[2] Includes $10,000,000 stock of The RFC Mortgage Company.
[3] Includes $37,500,000 stock of Export-Import Banks.

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RECONSTRUCTION FINANCE CORPORATION

WASHINGTON

January 20, 1936.

To the President and the Congress of the United States:

I am pleased to give you a report covering operations of the Corporation since its organization February 2, 1932, to December 31, 1935.

Total authorizations and allocations for all purposes have been $10,616,833,860.76. Of this amount $2,697,379,330.53 was the result of direct allocations by Congress and $7,919,454,530.23 authorized by the Directors of the Corporation.

Total disbursements for all purposes have been $8,197,376,669.84; $2,366,728,506.25 the result of direct allocations by Congress, including $1,599,973,202.59 for direct relief; and $5,830,648,163.59 for authorizations by the Directors of the Corporation. $3,237,092,716.44, or 55.5% of the $5,830,648,163.59 has been repaid.

$4,506,565,644.35 of the $5,830,648,163.59 was for loans of all character. $2,958,871,077.92, or 65.7%, has been repaid.

Loans in the aggregate amount of $1,350,044,820.73 were authorized to 4,950 banks which were open when the loans were made. $1,142,590,340.69 of these authorizations were disbursed, and $975,587,748.53, or 85.4%, have been repaid. Loans to 1,170 of these banks that closed after the loans were made, have been paid in full.

Of $1,071,348,339.23 disbursed for the purchase of preferred stock, capital notes, and debentures, in 6,057 banks and trust companies, including $30,375,000 for 9 insurance companies, $141,679,200.73 has been repaid.

Such authorizations were made to 6,840 banks and trust companies in the aggregate amount of $1,328,633,169.41.

Of $876,124,844.81 disbursed for distribution to depositors in closed banks, $630,399,741.51, or 72%, has been repaid. Total authorizations for this purpose have been $1,170,031,738.40.

We have authorized $121,153,518.84 for loans to drainage, levee, and irrigation districts, to mutual nonprofit companies, and to incor-

porated water-users' associations, of which $50,103,730.81 has been disbursed. Upon the average these disbursements have reduced the debt of the districts 53.73 percent, and the bond service charges to the farmers approximately two-thirds. The loans disbursed have benefited 61,122 land-owners.

Disbursements for self-liquidating loans have been $192,608,981.36, and repayments $45,045,886.29.

We have authorized 1,919 loans to industry to 1,802 borrowers in the aggregate amount of $124,503,281.85, an average of $69,091 per borrower. This does not include participations by banks of $5,575,982. On these loans we have disbursed $48,720,532 and repayments have been $3,266,728. According to the applications, 265,507 people will have been given employment or continued in employment by reason of these loans. The applications indicate that 88,142 new jobs will have been made possible.

The 1,919 industrial loans authorized are from a total of 4,699 applications received and acted upon at our Washington office, and 6,952 received at our agencies.

We have authorized 37 loans to the mining industry in the aggregate amount of $7,145,000, of which $932,000 has been disbursed.

Loans outstanding to 56 railroads, including 23 in receivership or that have filed petitions under the Bankruptcy Act, total $396,249,860.90. Our total loans to railroads are secured by collateral having an aggregate present quoted or appraised value of approximately 148 percent of the amount of the loans. However, upon the basis of present quotations, there appears to be a deficiency of $32,500,000 in the collateral of certain of these roads, but the securities that will come to us from reorganizations will in all probability, with few exceptions, be worth the amount of the loans.

We have bought $292,853,921.92 par value of securities from P. W. A. and have sold or collected $140,805,900 of these at a premium over cost of $3,804,636.30.

We loaned $141,831,481.94 on the 1933 cotton crop at 10 cents a pound, all of which has been repaid. We loaned $280,923,107.92 on the 1934 crop, at 12 cents a pound, $20,329,046.19 of which has been repaid. We have authorized loans on the 1935 cotton crop at 10 cents a pound. Only $296,861.24 has been disbursed to date.

We loaned $120,664,190.24 on the 1933 corn crop at 45 cents a bushel, all of which has been repaid. We loaned $4,323,884.68 on the 1934 corn crop at 55 cents a bushel, all of which has been repaid. We have disbursed $669,676.77 on the 1935 corn crop at 45 cents a bushel.

We have authorized $4,500,000 for loans on the 1935 dark tobacco crop at approximately 11 cents per pound. We now have outstanding $6,223,-541.83 in loans on the 1931, 1932, 1933, and 1934 dark tobacco crops at approximately 11 cents per pound.

During the year The RFC Mortgage Company was organized under the laws of the State of Maryland with an authorized capital of $25,000,000 and paid-in capital of $10,000,000, all owned by the Corporation. It makes loans for new construction and for refinancing real-estate mortgages; makes loans secured by mortgage bonds or mortgage certificates of deposit; and purchases mortgages insured by the Federal Housing Administration. The company has authorized 1,060 such loans or purchases, aggregating $33,980,278.81, of which $5,743,754.65 has been disbursed and $26,891,-969.85 remains available to the applicants pending compliance with requirements.

During the year $64,093,000 of our 2-percent notes given to banks in the preferred stock program, which matured January 10, 1935, were exchanged for an equal amount of such notes bearing the same rate due July 1, 1937; and $149,171,666.67 of such notes bearing 2¼ percent, which matured on December 15, 1935, were exchanged for an equal amount of our 1½ percent 3-year notes.

During the year we paid interest on our obligations totaling $52,910,-078.69, of which $47,370,483.66 was paid to the United States Treasury. Our total interest payments to date on borrowed money aggregate $153,-810,656.94 of which $143,977,799.89 was paid to the United States Treasury. Except for funds advanced to other governmental agencies and for relief, and for the purchase of securities from P. W. A., our collections for 1935 exceeded our disbursements by $7,255,800.38. Funds advanced to other governmental agencies and for relief as a result of allocations by Congress totaled $362,587,445.

Total disbursements to other governmental agencies and for relief as a result of allocations by Congress have been $2,366,728,506.25

Total administrative expenses of the Corporation, both at Washington and our 32 agencies, including custodian expenses, have been less than 0.42 percent on loans and investments authorized, not including allocations to other governmental agencies and the Federal Emergency Relief Administrator; and 0.57 percent on moneys actually disbursed for all purposes except allocations to other governmental agencies and the Federal Emergency Relief Administrator.

Interest and dividends, collected and accrued, have exceeded by $115,844,219.97 our expenses, including interest paid and accrued on our notes held by the Treasury and others (but not including $17,889,932.90 interest on money borrowed for advances to other governmental agencies and for relief).

If the policies of the Corporation are continued substantially as they have been, it appears that this $115,844,219.97, together with the small margin between interest we pay the Treasury and our lending rates, will be sufficient to cover losses on all loans including investments in banks and insurance companies, assuming Commodity Credit Corporation will have no ultimate loss.

JESSE H. JONES,
Chairman of the Board.

SUMMARY OF ACTIVITIES OF THE RECONSTRUCTION FINANCE CORPORATION AND ITS CONDITION AS OF DEC. 31, 1935

LOANS, INVESTMENTS, AND ALLOCATIONS AUTHORIZED

FROM FEB. 2, 1932, THROUGH DEC. 31, 1935

Loans on cotton, corn, tobacco, and other commodities	$1,208,807,247.06
Loans for distribution to depositors in closed banks	1,170,031,738.40
Loans to receivers of building and loan associations	23,157,069.21
Loans to railroads (including receivers)	670,142,492.00
Loans to drainage, levee, and irrigation districts	121,153,518.84
Loan to Chicago Board of Education to pay teachers' salaries	22,500,000.00
Loans to industrial and commercial businesses (1,779 loans) including fishing, mining, milling, and smelting	115,133,506.85
Loans to banks and trust companies (10,576 loans)	1,350,044,820.73
Loans to Federal land banks	399,636,000.00
Loans to mortgage loan companies (including 162 loans to community mortgage loan companies for lending to industry)	[1] 382,749,534.24
Loans to aid in financing self-liquidating construction projects (including $12,750,000 loans for the repair and reconstruction of property damaged by earthquake, fire, tornado, and cyclone)	294,457,054.86
Loans to regional agricultural credit corporations	178,840,452.48
Loans to building and loan associations	121,847,644.04
Loans to insurance companies	102,850,858.28
Loans to joint stock land banks	21,305,572.68
Loans to livestock credit corporations	14,758,827.88
Loans to Federal intermediate credit banks	9,250,000.00
Loans to State funds created to insure deposits of public moneys	10,787,715.88
Loans to agricultural credit corporations	6,040,140.31
Loans to credit unions	642,967.80
Loans to processors or distributors for payment of processing taxes	26,089.27
Loans on preferred stock in banks	26,227,455.00
Loans on preferred stock in insurance companies	34,270,000.00
Purchase of capital stock in mortgage companies	[2] 22,000,000.00
Purchase of preferred stock in 1 insurance company	100,000.00
Purchases of preferred stock in 4,134 banks	[3] 832,852,934.00
Purchases of capital notes and debentures in 2,847 banks	435,177,780.41
Purchases of securities from P. W. A	344,658,110.01
Allocations to other governmental agencies by direction of Congress	7,919,454,530.23
Allocations for direct relief by direction of Congress	897,379,330.53
	1,800,000,000.00
Total	10,616,833,860.76

[1] Includes $25,000,000 to The RFC Mortgage Company.
[2] Includes $10,000,000 stock of The RFC Mortgage Company.
[3] Includes $37,500,000 stock of Export-Import Banks.

Of the above authorizations $1,005,423,794.62 has been canceled or withdrawn.

LOANS, INVESTMENTS, AND ALLOCATIONS DISBURSED

FROM FEB. 2, 1932, THROUGH DEC. 31, 1933

Loans on cotton, corn, tobacco, and other commodities	$595, 572, 969. 92
Loans for distribution to depositors in closed banks	876, 124, 844. 81
Loans to receivers of building and loan associations	2, 000, 189. 96
Loans to railroads (including receivers)	487, 216, 824. 11
Loans to drainage, levee, and irrigation districts	50, 103, 730. 81
Loan to Chicago Board of Education to pay teachers' salaries	22, 300, 000. 00
Loans to industrial and commercial businesses, including fishing, mining, milling, and smelting	43, 968, 885. 60
Loans to banks and trust companies	1, 142, 590, 340. 69
Loans to Federal land banks	387, 236, 000. 00
Loans to mortgage loan companies	[1] 223, 321, 144. 12
Loans to aid in financing self-liquidating construction projects (including loans for the repair and reconstruction of property damaged by earthquake, fire, tornado, and cyclone)	192, 608, 981. 36
Loans to regional agricultural credit corporations	173, 243, 640. 72
Loans to building and loan associations	114, 441, 060. 54
Loans to insurance companies	89, 519, 494. 76
Loans to joint-stock land banks	15, 809, 372. 29
Loans to livestock credit corporations	13, 101, 598. 69
Loans to Federal intermediate credit banks	9, 250, 000. 00
Loans to State funds created to insure deposits of public moneys	10, 764, 631. 18
Loans to agricultural credit corporations	5, 562, 890. 94
Loans to credit unions	600, 095. 79
Loans to processors or distributors for payment of processing taxes	14, 718. 06
Loans on preferred stock in banks	20, 939, 230. 00
Loans on preferred stock in insurance companies	30, 275, 000. 00
Purchase of capital stock in The RFC Mortgage Company	10, 000, 000. 00
Purchase of preferred stock in one insurance company	100, 000. 00
Purchases of preferred stock in 3,542 banks	[2] 679, 834, 809. 23
Purchases of capital notes and debentures in 2,562 banks	340, 199, 300. 00
Purchases of securities from P. W. A	293, 948, 410. 01
Allocations to other governmental agencies by direction of Congress	5, 830, 648, 163. 59
Allocations for direct relief by direction of Congress	766, 755, 303. 66
Total	1, 599, 973, 202. 59
	8, 197, 376, 669. 84

[1] Includes $4,798,528.97 to The RFC Mortgage Company.
[2] Includes $12,500,000.00 for stock of Export-Import Banks.

RECEIPTS AND DISBURSEMENTS

FROM FEB. 2, 1932, THROUGH DEC. 31, 1935

RECEIPTS	
From repayments on loans (including $3,212,950.30 on loans secured by preferred stock of banks)	$2,932,819,541.80
From retirement of preferred stock, capital notes, and debentures	138,274,250.43
From sale of P. W. A. securities	139,916,152.00
From sale of Chicago Board of Education bonds (teachers' loan) (sold at premium of $223,000)	22,300,000.00
From relief advances, 1932 act	3,358,351.00
From advances and other reimbursable items	7,582,403.82
From interest	223,502,350.06
From dividends on preferred stock	29,995,400.95
From sale of gold to Secretary of the Treasury (at book)	131,977,955.52
From regional agricultural credit corporations as reductions of capital and for deposit	73,755,000.00
From The RFC Mortgage Company for deposit	9,998,500.00
From miscellaneous sources (including $27,174,442.13 suspended credits and $7,918,607.53 other remittances not credited on borrower's indebtedness)	46,697,447.19
Total receipts in ordinary activities of Corporation	3,760,177,352.77
From sale of capital stock to Secretary of the Treasury	500,000,000.00
From sale of notes:	
To Secretary of the Treasury	4,640,000,000.00
To institutions whose preferred stock, capital notes, or debentures were purchased by the Corporation or to which the Corporation made loans secured by preferred stock and to holders of notes originally sold to such institutions	474,324,333.34
Total receipts	9,374,501,686.11
DISBURSEMENTS	
Loans on cotton, corn, tobacco, and other commodities	595,572,969.92
Loans for distribution to depositors in closed banks	876,124,844.81
Loans to receivers of building and loan associations	2,000,189.96
Loans to railroads (including receivers)	487,216,824.11
Loans to drainage, levee, and irrigation districts	50,103,730.81
Loans to Chicago Board of Education to pay teachers' salaries	22,300,000.00
Loans to industrial and commercial businesses (including fishing, mining, milling, and smelting)	43,968,540.40
Loans on preferred stock in banks	20,939,230.60
Loans on preferred stock in insurance companies	30,275,000.00
Loans for all other purposes	2,372,726,147.60
Purchase of stock of The RFC Mortgage Company	10,000,000.00
Purchase of preferred stock in one insurance company	100,000.00
Purchases of preferred stock in banks	679,834,809.23
Purchases of capital notes and debentures in banks	340,199,300.00
Purchases of securities from P. W. A.	293,482,484.23
Advances and other reimbursable items	8,597,698.02
Redemption of notes issued for gold	131,575,460.82
Regional agricultural credit corporations for increases of capital and return of deposits	63,755,000.00
Interest paid on notes sold to Secretary of the Treasury	143,977,799.89
Interest paid on notes sold to financial institutions	9,832,857.05
Operating expenses	32,996,279.69
Miscellaneous disbursements (including $15,235,709 refunds of suspended credits)	31,427,116.80
Total disbursed in ordinary activities of Corporation	6,247,006,283.34
Disbursed to other governmental agencies and for direct relief	2,349,318,260.85
Disbursed for payment of notes issued:	
To Secretary of the Treasury	545,000,000.00
To financial institutions	221,864,666.67
Total disbursements	9,363,189,210.86

LOANS, INVESTMENTS, AND ALLOCATIONS DISBURSED

PRIOR TO MAR. 4, 1933, AND AFTER MAR. 4, 1933

	Feb. 2, 1932, through Mar. 3, 1933	Mar. 4, 1933, through Dec. 31, 1935
Loans on cotton, corn, tobacco, and other commodities	$1, 547, 572. 25	$594, 025, 397. 67
Loans for distribution to depositors in closed banks	79, 572, 017. 26	796, 552, 827. 55
Loans to receivers of building and loan associations		2, 000, 189. 96
Loans to railroads (including receivers)	325, 417, 074. 57	161, 799, 749. 54
Loans to drainage, levee, and irrigation districts		50, 103, 730. 81
Loan to Chicago Board of Education to pay teachers' salaries		22, 300, 000. 00
Loans to industrial and commercial businesses (including fishing, mining, milling, and smelting)		43, 968, 885. 60
Loans to banks and trust companies	951, 440, 497. 27	191, 149, 843. 42
Loans to Federal land banks	18, 800, 000. 00	368, 436, 000. 00
Loans to mortgage loan companies	90, 702, 926. 48	[1] 132, 618, 217. 64
Loans to aid in financing self-liquidating construction projects (including loans for the repair and reconstruction of property damaged by earthquake, fire, tornado, and cyclone)	18, 674, 000. 00	173, 934, 981. 36
Loans to regional agricultural credit corporations	41, 435, 449. 61	131, 808, 191. 11
Loans to building and loan associations	101, 523, 591. 68	12, 917, 468. 86
Loans to insurance companies	80, 523, 480. 19	8, 996, 014. 57
Loans to joint stock land banks	4, 897, 209. 38	10, 912, 162. 91
Loans to livestock credit corporations	11, 928, 530. 78	1, 173, 067. 91
Loans to Federal intermediate credit banks		9, 250, 000. 00
Loans to State funds created to insure deposits of public moneys		10, 764, 631. 18
Loans to agricultural credit corporations	3, 615, 227. 28	1, 947, 663. 66
Loans to credit unions	449, 653. 00	150, 442. 79
Loans to processors or distributors for payment of processing taxes		14, 718. 06
Loans on preferred stock in banks		20, 939, 230. 00
Loans on preferred stock in insurance companies		30, 275, 000. 00
Purchase of capital stock in The RFC Mortgage Company		10, 000, 000. 00
Purchase of preferred stock in one insurance company		100, 000. 00
Purchases of preferred stock in 3,542 banks		[2] 679, 834, 809. 23
Purchases of capital notes and debentures in 2,562 banks		340, 199, 300. 00
Purchases of securities from P. W. A.		293, 948, 410. 01
Allocations to other governmental agencies and for direct relief	1, 730, 527, 229. 75	4, 100, 120, 933. 84
Total	296, 537, 006. 28	2, 070, 191, 499. 97
	2, 027, 064, 236. 03	6, 170, 312, 433. 81

[1] Includes $4,798,528.97 to The RFC Mortgage Company.
[2] Includes $12,500,000 for stock of Export-Import Banks.

AUTHORIZATIONS BY STATES FOR DISTRIBUTION TO DEPOSITORS IN CLOSED BANKS THROUGH REORGANIZATION AND LIQUIDATION

FROM FEB. 2, 1932, THROUGH DEC. 31, 1935

(Includes loans to receivers, conservators, loans through mortgage-loan companies to aid closed banks, and loans on assets of closed banks under section 5e of the Reconstruction Finance Corporation Act)

State	Amount authorized	Amount disbursed	Amount repaid
Alabama	$6,281,112.46	$3,195,442.37	$1,689,960.37
Arizona	464,500.00	279,701.73	216,682.07
Arkansas	10,083,571.60	6,192,063.99	2,939,451.47
California	16,895,399.96	14,042,268.99	12,472,535.65
Colorado	1,922,450.20	1,437,378.87	1,185,342.73
Connecticut	3,196,000.00	2,655,765.52	988,891.39
Delaware			
District of Columbia	13,719,200.00	11,657,692.96	8,379,597.01
Florida	6,822,272.27	3,077,459.97	899,125.13
Georgia	5,023,995.48	2,794,662.85	1,249,342.22
Idaho	3,628,400.00	3,264,193.27	1,747,659.37
Illinois	62,107,820.90	41,473,308.87	27,766,210.68
Indiana	22,770,264.77	16,090,766.06	13,023,404.56
Iowa	18,100,279.82	14,674,991.53	14,048,257.82
Kansas	3,625,500.00	2,449,781.75	2,136,490.02
Kentucky	9,347,708.87	7,065,303.81	6,145,191.71
Louisiana	35,666,526.67	27,955,258.78	12,999,854.79
Maine	41,964,276.50	37,639,825.34	29,931,797.82
Maryland	13,413,924.00	11,160,725.71	6,703,708.40
Massachusetts	27,482,274.65	23,191,537.92	12,792,985.03
Michigan	303,637,871.09	239,182,405.26	172,691,184.13
Minnesota	5,566,978.88	2,641,548.73	2,337,946.51
Mississippi	7,223,559.94	5,675,986.19	3,723,955.73
Missouri	15,769,766.98	11,064,876.25	8,927,005.66
Montana	958,200.00	766,113.66	508,869.27
Nebraska	3,797,153.43	2,667,028.75	2,205,121.09
Nevada	1,691,058.00	1,411,489.79	881,857.82
New Hampshire	500,000.00	460,402.31	460,402.31
New Jersey	30,811,820.91	19,051,700.76	13,223,351.48
New Mexico	478,473.54	417,677.04	362,095.54
New York	54,867,362.89	41,324,268.60	31,465,031.94
North Carolina	10,775,517.52	7,264,031.89	5,288,964.18
North Dakota	2,551,070.53	1,586,562.22	875,141.33
Ohio	216,518,958.81	167,265,518.33	138,861,436.74
Oklahoma	2,888,804.60	1,451,152.42	1,060,008.14
Oregon	2,620,800.00	2,312,429.86	1,570,854.20
Pennsylvania	116,294,140.61	73,101,612.04	43,269,059.62
Rhode Island	920,841.54	771,124.71	550,591.54
South Carolina	7,322,943.30	5,603,455.91	4,384,027.23
South Dakota	2,197,695.62	1,192,187.58	885,783.83
Tennessee	17,447,619.32	15,845,805.90	9,075,463.75
Texas	11,231,437.39	9,485,314.41	4,302,565.69
Utah	3,018,401.87	888,371.89	275,224.16
Vermont	1,192,800.00	869,799.29	781,499.29
Virginia	5,681,600.00	4,497,281.94	4,160,601.13
Washington	15,729,216.19	13,250,152.03	9,003,414 13
West Virginia	12,455,940.16	8,797,795.65	5,975,164.76
Wisconsin	13,180,727.13	6,980,621.11	5,976,632.07
Wyoming	185,500.00		
Total	1,170,031,738.40	876,124,844.81	630,399,741.51

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PURCHASES OF PREFERRED STOCK AND CAPITAL NOTES AND DEBENTURES IN BANKS AND TRUST COMPANIES, INCLUDING LOANS ON PREFERRED STOCK

FROM MAR. 9, 1933, THROUGH DEC. 31, 1935

State	Amount authorized	Amount disbursed	Amount repaid
Alabama	$16,058,200.00	$14,278,575.00	$3,200,032.43
Alaska	37,500.00	37,500.00	
Arizona	2,455,000.00	2,430,000.00	1,065,004.61
Arkansas	5,392,500.00	4,404,000.00	173,784.57
California	58,429,070.00	48,502,425.00	564,386.04
Colorado	5,060,000.00	4,893,500.00	17,500.00
Connecticut	8,664,800.00	7,192,126.00	78,200.00
Delaware	2,680,000.00	567,300.00	207,000.00
District of Columbia	[1] 42,700,000.00	[1] 15,400,000.00	[1] 2,500,000.00
Florida	2,334,200.00	2,046,000.00	55,086.74
Georgia	5,897,500.00	4,835,500.00	410,500.00
Idaho	2,070,000.00	1,690,000.00	64,720.21
Illinois	93,522,500.00	90,131,114.17	10,667,500.00
Indiana	18,659,980.41	16,387,000.00	448,020.00
Iowa	12,753,500.00	10,213,000.00	314,250.00
Kansas	6,620,000.00	5,176,500.00	143,500.00
Kentucky	11,177,000.00	8,874,850.00	468,500.00
Louisiana	16,797,000.00	15,272,000.00	4,573,500.00
Maine	13,333,000.00	9,125,500.00	154,821.92
Maryland	11,315,630.00	9,063,170.00	76,214.74
Massachusetts	20,326,000.00	16,174,200.00	937,584.60
Michigan	43,889,500.00	39,614,661.00	2,634,850.00
Minnesota	21,437,125.00	17,301,025.00	1,487,632.39
Mississippi	15,358,150.00	14,048,150.00	5,478,286.71
Missouri	25,679,600.00	20,612,125.00	9,450,500.00
Montana	4,087,500.00	3,990,500.00	1,004,300.00
Nebraska	8,949,200.00	7,897,950.00	1,004,509.76
Nevada	205,000.00	205,000.00	
New Hampshire	1,363,000.00	751,635.00	150,000.00
New Jersey	87,010,300.00	69,617,016.07	572,134.02
New Mexico	1,067,500.00	690,000.00	24,000.00
New York	377,434,150.00	301,201,605.83	73,911,140.26
North Carolina	8,157,500.00	7,463,500.00	254,359.58
North Dakota	4,548,500.00	4,004,500.00	433,500.00
Ohio	114,650,764.00	79,977,973.00	6,982,000.00
Oklahoma	11,357,000.00	10,934,000.00	1,930,571.04
Oregon	2,300,000.00	1,950,000.00	251,905.43
Pennsylvania	58,675,350.00	45,332,496.50	1,278,563.22
Puerto Rico	1,500,000.00	1,250,000.00	100,000.00
Rhode Island	1,100,000.00	898,500.00	
South Carolina	2,921,800.00	2,746,500.00	553,500.00
South Dakota	4,524,100.00	4,438,100.00	549,939.65
Tennessee	14,285,600.00	11,634,100.00	227,500.00
Texas	35,921,750.00	30,481,125.00	1,286,602.47
Utah	4,310,000.00	3,995,000.00	905,000.00
Vermont	19,925,000.00	15,795,000.00	62,500.00
Virginia	12,776,000.00	10,694,650.00	1,097,659.79
Virgin Islands	251,000.00	125,000.00	
Washington	7,596,500.00	6,039,500.00	562,267.12
West Virginia	6,851,000.00	6,161,066.66	780,362.63
Wisconsin	38,155,000.00	33,065,600.00	2,324,368.39
Wyoming	1,687,500.00	1,362,500.00	69,141.41
Total	[1] 1,294,258,169.41	[1] 1,040,973,339.23	[1] 141,487,200.73

[1] Includes $37,500,000 authorized and $12,500,000 disbursed to the Export-Import Banks of Washington, and $2,500,000 repaid by the Second Export-Import Bank of Washington, D. C.

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[fol. 32] EXHIBIT 3

Reconstruction Finance Corporation, Washington

May 25, 1933.

Regional Agricultural Credit Corporation Bulletin No. 60
Subject: Transfer of Jurisdiction and Control to Farm Credit Administration

To All Regional Agricultural Credit Corporations:

Under the Executive Order issued by the President on March 27, 1933, there is transferred to the jurisdiction and control of the Farm Credit Administration: The functions of the Reconstruction Finance Corporation and its board of directors relating to the appointment of officers and agents to manage regional agricultural credit corporations formed under section 201 (e) of the Emergency Relief and Construction Act of 1932; relating to the establishment of rules and regulations for such management; and relating to the approval of loans and advances made by such corporations and of the terms and conditions thereof.

The Executive Order above referred to will become effective on May 27, 1933. Thereafter all communications with respect to the operations of the regional agricultural credit corporations (except as stated in Mr. Brennan's circular letter of May 23, 1933, and Mr. Reed's circular letter of May 24, 1933) should be addressed to George M. Brennan, Farm Credit Administration, Washington, D. C. Until you are otherwise advised the rules and regulations heretofore prescribed by the Directors of the Reconstruction Finance Corporation for the management and operation of the regional agricultural credit corporation remain in full force and effect, with the exception that all action heretofore requiring the approval of the Reconstruction Finance Corporation or the Directors thereof will require the approval of the Farm Credit Administration by the Governor thereof, or by such other person or persons as may be designated by him for the purpose.

By Order of the Directors of the Reconstruction Finance Corporation.

(Sgd.) L. P. Bethea, Acting Secretary.

Approved: (Sgd.) H. Morgenthau, Jr., Governor, Farm Credit Administration.

[fol. 33] BEFORE STATE TAX COMMISSION OF UTAH

ORDER DENYING PETITION FOR REDETERMINATION OF TAX

December 31, 1936.

Minute Entry: Meeting held December 29, 1936

Upon motion of Mr. Knight, seconded by Mr. Leatham, the Commission directed that the petition of W. Q. Van Cott for redetermination of Income Tax upon his return for the year 1935 be denied.

[fol. 34] IN SUPREME COURT OF UTAH

W. Q. VAN COTT, Plaintiff,

vs.

TAX COMMISSION OF THE STATE OF UTAH, and IRWIN ARNOVITZ, R. E. Hammond, H. P. Leatham, and J. Will Knight, Members of Said Tax Commission, Defendants

PETITION FOR WRIT OF CERTIORARI

To the Honorable Justices of the Supreme Court of the State of Utah:

Comes now your petitioner above named and respectfully shows:

1. Your petitioner is now, and at all times herein mentioned has been, a resident of Salt Lake County, State of Utah. Commencing in 1932 and at all times thereafter petitioner has been counsel for the Salt Lake Agency of the Reconstruction Finance Corporation and also counsel for the Regional Agricultural Credit Corporation of Salt Lake City, Utah, both corporations created by the Congress of the United States for purely governmental purposes. Petitioner has not paid the income tax levied by the State of Utah on the income received from said Reconstruction Finance Corporation and Regional Agricultural Credit Corporation for the year 1935. Under date of May 25, 1936, the defendants informed the plaintiff that they proposed to make an adjustment with respect to plaintiff's income tax liability in the sum of $320.28 on account of income tax

applicable to the increased income of plaintiff on account of payments made by Reconstruction Finance Corporation and Regional Agricultural Credit Corporation. Under date of May 27, 1936, plaintiff filed with the defendants a petition for redetermination of such proposed tax, copy of which said petition for redetermination is hereto attached marked Exhibit A and made a part hereof. Thereafter a hearing was had respecting the said petition for redetermination and evidence was introduced. Under date of December 31, 1936, the said petition for redetermination was denied and plaintiff received notice of such denial on January 2, 1937.

[fol. 35] 2. The defendants in making and entering said order denying the said petition for redetermination of tax, and in proposing the adjustment above described, acted contrary to law and without its powers because:

(a.) All payments of salary and wages in question have been paid to the plaintiff by the Treasurer of the United States on account of services rendered in connection with the exercise of an essential governmental function rendered by the United States through said Reconstruction Finance Corporation and Regional Agricultural Credit Corporation of Salt Lake City and are therefore exempt under the provisions of Section 80-14-4 Revised Statutes of Utah, 1933; and

(b.) Under the Constitution of the United States the said salaries and wages paid to plaintiff in connection with the essential governmental functions of the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation of Salt Lake City, Utah, are not subject to taxation by the State of Utah.

3. Prior to filing this petition with your Honorable Court the plaintiff has filed with the said Tax Commission of the State of Utah an undertaking such as is required by the provisions of Section 80-14-42 Revised Statutes 1933 and has received the approval thereof by the said Tax Commission as fully complying with said Section.

4. Unless a writ of certiorari be issued as herein prayed the plaintiff will be without relief.

Wherefore your petitioner prays for a writ of certiorari for the purpose of having the lawfulness of the said decision

of the defendants inquired into and determined and that such writ shall require the said defendants to certify to this court not later than thirty days after the date of the issuance of said writ the entire record in the matter referred to herein of the said Tax Commission of the State of Utah, which shall include all proceedings and the evidence taken in the said case and proceedings, to this Honorable Court and that this court examine the said record and vacate and annul the said decisions made by the defendants and that [fol. 36] pending a review by this court of said decisions and of the record in said case all further proceedings be stayed and that your petitioner have such other and further relief as may be just and equitable.

W. Q. Van Cott.

Duly sworn to by W. Q. Van Cott. Jurat omitted in printing.

[fol. 37] IN SUPREME COURT OF UTAH

[Title omitted]

WRIT OF CERTIORARI

The State of Utah to the above named defendants:

Whereas, it appears from the verified petition of the above named plaintiff, on file herein, that he is beneficially interested in that certain proposal to make adjustment of 1935 income tax of plaintiff and the petition for redetermination of the tax so adjusted and the order of defendants denying such petition for redetermination and that the said proposal and order appear from the said petition to be in excess of the power and jurisdiction of the said defendants:

Now Therefore, the above defendants are hereby commanded to certify to this court on or before the 17th day of February, 1937, all of its records and proceedings in said matters, which shall include all of the proceedings and the evidence taken in such case, to this court pending a review of said record by this court and pending the final decision of this court in the premises you are commanded to desist from further proceedings in said case.

Witness the Supreme Court of the State of Utah and the Justices thereof at Salt Lake City, Utah, this 27th day of January, 1937.

(Signed) L. M. Cummings, Clerk of the Supreme Court of Utah.

As attorney for the defendants above named I hereby accept service of the above writ of certiorari and acknowledge having received copy of the petition therefor all this — day of January, 1937.

——, Attorney for Above Named Defendants.

[fol. 38] IN SUPREME COURT OF UTAH

#5902

W. Q. VAN COTT, Plaintiff,

v.

THE STATE TAX COMMISSION OF UTAH, and IRWIN ARNOVITZ, R. E. Hammond, H. P. Leatham, and J. Will Knight, Members Thereof, Defendants

OPINION

FOLLAND, Chief Justice:

The question for determination is whether or not the plaintiff's salary as agency counsel for the Salt Lake Agency of the Reconstruction Finance Corporation, hereafter called the R. F. C., and his salary as counsel for the Regional Agricultural Credit Corporation of Salt Lake City, hereafter called the R. A. C. C., are either of them or both taxable income for the purpose of the State income tax law. The answer will depend on the character of these corporations as to whether they exercise essential governmental functions or not. In submitting his report of taxable income for 1935, plaintiff claimed exemption of his salary received from the R. F. C. and R. A. C. C. The State Tax Commission made a finding of plaintiff's income and tax liability and required him to pay the tax on a net income which included the salaries in question. Plaintiff's petition for a redetermination of the proposed tax was denied by the Commission, and the case came here on certiorari.

Pertinent sections of the State income tax law are the following:

Sec. 80-14-2, R. S. Utah 1933, as amended:

"There shall be levied, collected and paid for each taxable year upon the net income of every resident of the State, a tax equal to the sum of the following:

"(1) One per cent of the first $1,000 of the amount of net income in excess of the credits against net income provided in section 80-14-7.

"(2) Two per cent of the next $1,000 of such excess amount.

"(3) Three per cent of the next $1,000 of such excess amount.

"(4) Four per cent of the next $1,000 of such excess amount.

"(5) Five per cent of the remainder of such excess amount."

Sec. 80-14-3 reads:

" 'Net income' means the gross income computed under section 80-14-4 less the deductions allowed by section 80-14-5."

In defining what constitutes "gross income", Subsec. (2)(g) of Sec. 80-14-4, listing exemptions, reads as follows:

"(g) Amounts received as compensation, salaries or wages from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function."

Under the last quoted section, the taxpayer is entitled to exclude from his gross income, in order to arrive at the figure for his taxable net income, any salary from the United States for "services rendered in connection with the exercise of an essential governmental function". Plaintiff asserts that his salary as counsel for the two named corpora- [fol. 39] tions are exempt under that section. The nature of our constitutional system of a dual government—State and Federal—is such as to impliedly deprive a state of the power to tax instrumentalities of the Federal Government

and likewise to prohibit the Federal Government from taxing instrumentalities of a State Government, where these exercise essential governmental functions. While a state by statute might extend exemption beyond that required by the Federal rule, it cannot provide for state taxation of United States instrumentalities or salaries declared by the United States Supreme Court to be exempt. The statute excluding governmental salaries, wages and commissions for services rendered in connection with the exercise of an essential governmental function is a recognition of the rule of immunity announced by the Supreme Court of the United States, that "a state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power." New York ex rel. Rogers v. Graves, 299 U. S. 401. The limitation on the power of the Federal Government with respect to taxation of local or state officials has been defined in similar language. In Brush v. Commissioner of Internal Revenue, 300 U. S. 352, 81 L. Ed. 443, 57 S. Ct. 495, the Supreme Court, speaking through Mr. Justice Sutherland, in defining what is meant by the phrase, "governmental functions", says:

"The phrase 'governmental functions,' as it here is used, has been qualified by this court in a variety of ways. Thus, in South Carolina v. United States, 199 U. S. 437, 461, 50 L. ed. 261, 268, 26 S. Ct. 110, 4 Ann. Cas. 737, it was suggested that the exemption of state agencies and instrumentalities from federal taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In Flint v. Stone Tracy Co., 220 U. S. 107, 172, 55 L. ed. 389, 421, 31 S. Ct. 342, Ann. Cas. 1912B, 1312, the immunity from taxation was related to the *essential* governmental functions of the state. In Helvering v. Powers, 293 U. S. 214, 225, 79 L. ed. 291, 295, 55 S. Ct. 171, we said that the state 'cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend.' And immunity is not established because the state has the power to engage in the business for what the state conceives to be the public benefit. Ibid. In United States v. California, 297 U. S. 175, 185, 80 L. ed.

the same had the Supreme Court decisions in the Graves and Brush Cases been before the Montana court. The decision relies for authority on cases decided by the Supreme Court of the United States holding that employes of the U. S. Shipping Board Emergency Fleet Corporation are not agents of the government. U. S. ex rel. Skinner & Eddy Corpn. v. McCarl, 275 U. S. 1, 48 S. Ct. 12, 72 L. Ed. 131; United States v. Strang, 254 U. S. 491, 41 S. Ct. 165, 166, 65 L. Ed. 368; United States v. Walter, 263 U. S. 15, 44 S. Ct. 10, 11, 68 L. Ed. 137; Lake Monroe, 250 U. S. 246, 252, 39 S. Ct. 460, 63 L. Ed. 962; Sloan Shipyards Corpn. v. Fleet Corporation, 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; Continental Bank & Trust Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 55 S. Ct. 595, 609, 79 L. Ed. 1110, 27 Am. Bankr. Rep. (N. S.) 715.

These cases, in the view of the Montana court, lend support to its conclusion. They were entirely ignored by the Supreme Court in its decisions in the Graves and Brush Cases in so far as the question here involved is concerned.

The case of Clinton v. State Tax Commission, supra, contains a well written opinion holding that salaries of employes of the Federal Land Bank, Federal Intermediate Credit Bank, and Production Credit Corporation, and Bank for Cooperatives are subject to state tax. These corporations, while in a sense instrumentalities of government, can hardly be said to be exercising governmental functions. The facts fixing their character distinguish them from the R.F.C. and the R.A.C.C.

In the Parker Case the Mississippi court held the salary of a Vice-president of the Federal Land Bank of New Orleans subject to state taxation. The Supreme Court of the United States, in denying certiorari, substantially held that that case was distinguishable from the Graves Case.

A case called to our attention by plaintiff since the argument herein is Geery v. Minnesota Tax Comm., — Min. —, 278 N. W. 594, wherein the Minnesota court by a divided opinion held the salary of the governor of the Federal Reserve Bank of Minneapolis not subject to state tax.

It must be conceded there is a great deal of confusion in the cases and that the line of demarcation is somewhat as expressed by Mr. Justice Sutherland in Brush v. Commissioner of Internal Revenue, supra.

"We thus come to a situation, which the courts have frequently been called upon to meet, where the issue cannot

be decided in accordance with an established formula, but where points along the line 'are fixed by decisions that this or that concrete case falls on the nearer or farther side.' Hudson County Water Co. v. McCarter, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 S. Ct. 529, 14 Ann. Cas. 560. We are, of course, quite able to say that certain functions exercised by a city are clearly governmental—that is, lie upon the nearer side of the line—while others are just as clearly private or corporate in character, and lie upon the farther side. But between these two opposite classes, there is a zone of debatable ground within which the cases must be put upon one side or the other of the line by what this court [fol. 46] has called the gradual process of historical and judicial 'inclusion and exclusion.' Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co., 294 U. S. 648, 670, 79 L. ed. 1110, 1125, 55 S. Ct. 595, 27 Am. Bankr. Rep. (N.S.) 715, and cases cited."

The Brush case was decided by a concurrence of five of the Justices, two additional Justices concurring in the result because the exemption was within the terms of the exemption prescribed by Treasury Regulations 74, Art. 643. A strong dissent was voiced by Mr. Justice Roberts on behalf of himself and Mr. Justice Brandeis. In the dissenting opinion is suggested the need for a more rational and practical rule respecting taxability of salaries or compensation paid the officers of one government by the other:

"It seems to me that the reciprocal rights and immunities of the national and a state government may be safeguarded by the observance of two limitations upon their respective powers of taxation. These are that the exactions of the one must not discriminate against the means and instrumentalities of the other and must not directly burden the operations of that other. To state these canons otherwise: An exaction by either government which hits the means or instrumentalities of the other infringes the principle of immunity if it discriminates against them and in favor of private citizens or if the burden of the tax be palpable and direct rather than hypothetic and remote. Tested by these criteria the imposition of the challenged tax in the instant case was lawful."

We cannot help thinking that the imposition of a tax on gross receipts of a government contractor, as in the Dravo

Case, burdens the operations of the government as much or more than does a tax on income which includes a salary from a government instrumentality such as the R. F. C. or the Federal Reserve Bank. It is interesting to note that the test suggested by Mr. Justice Roberts is quite in harmony with McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, in which case the doctrine of immunity had its birth. The test declared by the majority finds support in the later decisions of Collector v. Day, 11 Wall. 113; Pollock v. Farmers' Loan & Tr. Co., 157 U. S. 429, 158 U. S. 601; Evans v. Gore, 253 U. S. 245. The tax declared void in McCulloch v. Maryland was a stamp tax imposed on note issues of banks operating in the state but not chartered by the state. It was obviously a discriminatory tax imposed for the purpose of driving the Bank of the United States out of the State of Maryland. The decision of Mr. Chief Justice Marshall nevertheless upheld the uniform and non-discriminatory state tax on the real estate and other property of the bank.

In view of the stand taken by the court in James v. Dravo Contracting Company, supra, and Atkinson v. State Tax Commission of Oregon, 156 Or. 461, 62 P. (2d) 13, 67 P. (2d) 161, holding the state tax on gross or net incomes of governmental contractors does lay an unconstitutional burden upon the Federal Government, we may anticipate that the doctrine of immunity for salaries of officials of the government or its instrumentalities may be re-examined and a different test applied more in harmony with the suggestions of Mr. Justice Roberts. Until such is done, the states are bound by the decision of the Supreme Court in Rogers v. Graves, supra. Our statute having made exempt salaries, wages and compensation received "from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function", we must decide this case under our statute in the light of the meaning of its terms as construed by the Supreme Court of the United States. The literature on the subject is most interesting. The following are cited as furnishing a basis for our suggestion that a re-examination of the doctrine by the United States Supreme Court is not to be unexpected:

"Tax-Exempt Salaries and Securities: A Re-Examination", by Joseph L. Lewinson; American Bar Journal, September, 1937, p. 685; "Indirect Encroachment on Federal

Authority by the Taxing Powers of the State", by Thomas Reed Powell, 31 H. L. R. 321. See, also, Note, 36 H. L. R. 737; Note, 44 H. L. R. 1141; Note, 49 H. L. R. 1323; 47 H. L. R. 321; 50 H. L. R. 142; 51 H. L. R. 707.

[fol. 47] We shall have to be content to follow, as we think we must, the doctrine of the Graves Case until such time as a different rule is laid down by the courts, the Congress or the people through amendment to the Constitution.

The order of the Tax Commission is hereby reversed and the cause remanded to the Commission with instructions to redetermine the tax in accordance with the views herein expressed. Costs to plaintiff.

We Concur: ——— ———. ——— ———.

[fol. 48] In Supreme Court of Utah, Regular February Term, 1938

Order No. 5902

W. Q. Van Cott, Plaintiff,

v.

The State Tax Commission of Utah, and Irwin Arnovitz, R. E. Hammond, H. P. Leatham and J. Will Knight, Members Thereof, Defendants

Judgment—May 6, 1938

This cause having been argued and submitted on the return made to the Writ of Review heretofore issued herein, and the court being sufficiently advised in the premises, it is now ordered, adjudged, and decreed that the order of the State Tax Commission be, and the same is, reversed and the cause remanded to the Commission with instructions to redetermine the tax in accordance with the views expressed in the opinion filed herein. Costs to plaintiff.

In Supreme Court of Utah

Order Denying Rehearing—July 5, 1938

On consideration of the Petition for Rehearing heretofore filed herein, and of the arguments of counsel thereupon

567, 573, 56 S. Ct. 421, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged.

"In the present case, upon the one side, stress is put upon the adjective 'essential,' as used in the Flint v. Stone Tracy Co. Case, while, on the other side, it is contended that this qualifying adjective must be put aside in favor of what is thought to be the greater reach of the word 'usual,' as employed in the Powers Case. But these differences in phraseology, and the others just referred to, must not be too literally contradistinguished. In neither of the cases cited, was the adjective used as an exclusive or rigid delimitation. For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case."

From these cases, the rule may be deduced that each government is denied the power to tax the essential governmental functions of the other, and this limitation of power has extended to salaries, wages, or compensation paid to officers or employes of the government itself or an instrumentality which it supports in the exercise of essential governmental functions. The reason for the rule and the difficulty in laying down a precise formula in advance is well stated in the Brush Case by Mr. Justice Sutherland, speaking for the court, as follows:

"So long as our present dual form of government endures, the states, it must never be forgotten, 'are as independent of the general government as that government within its [fol. 40] sphere is independent of the states.' Collector v. Day (Buffington v. Day) 11 Wall. 113, 124, 20 L. ed. 122, 125. And, as it was said in Texas v. White, 7 Wall. 700, 725, 19 L. ed. 227, 237, and often has been repeated—'the preservation of the States and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government.' The unimpaired existence of both governments is equally essential. It is to that high end that this court has recognized the rule, which rests upon necessary implication, that neither may tax the governmental means and instrumentalities of the other.

• • • "We thus come to a situation, which the courts have frequently been called upon to meet, where the issue

cannot be decided in accordance with an established formula, but where points along the line 'are fixed by decisions that this or that concrete case falls on the nearer or farther side.' • • •

"• • • Metcalf & Eddy v. Mitchell, 269 U. S. 514, 523, 70 L. ed. 384, 392, 46 S. Ct. 172. In the case last named we had occasion to point out the difficulty, albeit the necessity, as cases arise within the doubtful zone, of drawing the line which separates those activities which have some relation to government but are subject to taxation from those which are immune. 'Experience has shown,' we said, 'that there is no formula by which that line may be plotted with precision in advance. But recourse may be had to the reason upon which the rule rests, and which must be the guiding principle to control its operation. Its origin was due to the essential requirement of our constitutional system that the federal government must exercise its authority within the territorial limits of the states; and it rests on the conviction that each government, in order that it may administer its affairs within its own sphere, must be left free from undue interference by the other.' "

It is necessary to the life of a government that its power of taxation be not unduly restricted. Hence, the courts have recognized that immunity should not be extended to all instrumentalities and their employes, but to such only as are engaged in performing essential governmental functions. The problem has become extremely difficult because of the modern trend of expansion of governmental activities. This movement is not alone in the Federal Government, but is noticeable in states and cities as well. Cities are extending their activities in the field of furnishing power and light as well as water to their inhabitants. States have undertaken to engage in the sale and distribution of intoxicating liquors formerly believed to be exclusively the function of private enterprise. South Carolina v. United States, 26 S. Ct. 110, 199 U. S. 437, 50 L. ed. 261, 4 Ann. Cas. 737; Ohio v. Helvering, 292 U. S. 360, 54 S. Ct. 725, 78 L. ed. 1307. The Federal Government has entered many new fields, using extensively the corporate medium, as for example: The United States Shipping Board Emergency Fleet Corporation, Federal Land Banks, Federal Intermediate Credit Banks, Tennessee Valley Authority, Production Credit Corporation, and many others in addition to the R. F. C.

and the R. A. C. C. Every year more people are employed in governmental or quasi-governmental activities of the type mentioned, so that large sources of revenue are withdrawn from one or the other governments if these are immune from taxation, and the problem of raising tax revenue from salaries and wages becomes increasingly difficult. Likewise, the question whether one government has the power to tax the income of contractors who contract with the other government has given the courts much concern. In the latest decision on the subject, Ernest K. James v. Dravo, — U. S. — (decided December 6, 1937), the Supreme Court asserted a practical solution of the problem looking to the preservation of the taxing power of the state as against a more logical application of the theory of immunity. In the Dravo Case the question involved the validity of a state tax on the gross receipts of a contractor who contracted with the United States Government. After declaring that the tax in question was not laid on the government, its property or officers, nor upon a contract of the government, the court, speaking through Mr. Chief Justice Hughes, said:

[fol. 41] "The application of the principle which denies validity to such a tax has required the observing of close distinction in order to maintain the essential freedom of government in performing its functions, without unduly limiting the taxing power which is equally essential to both nation and state under our dual system."

Referring to Metcalf & Eddy v. Mitchell, 269 U. S. 514, 70 L. Ed. 384, 46 S. Ct. 172, which held that earnings of a contractor with a political subdivision of a state were subject to the Federal income tax, the court commented:

"The pith of the decision in the case of Metcalf & Eddy is that government bonds and contracts for the services of an independent contractor are not upon the same footing. The decision was a definite refusal to extend the doctrine of cases relating to government securities, and to the instrumentalities of government, to earnings under contracts for labor.

"The reasoning upon which that decision was based is controlling here. We recognized that in a broad sense 'the burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the States and vice versa'. 'Taxation by either the state or the

federal government affects in some measure the cost of operation of the other.' As 'neither government may destroy the other, or control in any substantial manner the exercise of its powers', we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax • • • or the appropriate exercise of the functions of the government affected by it'. Metcalf & Eddy v. Mitchell, supra, pp. 523, 524.

"We said further that the nature of the governmental agencies or the mode of their constitution could not be disregarded in passing on the question of tax exemption, as it was obvious that an agency might be of such a character or so intimately connected with the exercise of a power or the performance of a duty by the one government 'that any taxation of it by the other would be such a direct interference with the functions of government itself as to be plainly beyond the taxing power'. And it was on that principle that 'any taxation by one government of the salary of an officer of the other, or the public securities of the other, or an agency created and controlled by the other, exclusively to enable it to perform a governmental function', was prohibited. We concluded that a nondiscriminatory tax upon the earnings of an independent contractor derived from services rendered to the Government could not be said to be imposed 'upon an agency of government in any technical sense' and could not 'be deemed to be an interference with government or an impairment of the efficiency of its agencies in any substantial way'. Id., pp. 524, 525."

It will be noted that the court distinguished the case from those cases involving salaries of officers of the one government which cannot be taxed by the other and also from "an agency created and controlled by the other, exclusively to enable it to perform a governmental function".

Again, in Helvering v. Therrell, — U. S. — (decided February 28, 1938), the court held that the Federal Government had power to tax compensation paid to attorneys and others out of corporate assets for necessary services rendered in liquidation of insolvent corporations by a state officer under

a state statute. The court made further declaration of the principle as follows:

"The Constitution contemplates a national government free to use its delegated powers; also state governments capable of exercising their essential reserved powers; both operate within the same territorial limits; consequently the Constitution itself, either by word or necessary inference, [fol. 42] makes adequate provision for preventing conflict between them.

"Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

"By definition precisely to delimit 'delegated powers' or 'essential governmental duties' is not possible. Controversies involving these terms must be decided as they arise, upon consideration of all the relevant circumstances. Notwithstanding discordant views which have sometimes arisen because of varying emphasis given to one or another of such circumstances, it is now settled doctrine that the inferred exemption from federal taxation does not extend to every instrumentality which a State may see fit to employ. Exemption depends upon the nature of the undertaking; it is cabined by the reason which underlies the inference."

As distinguishing factors, the court mentioned:

"The compensation of the taxpayers was paid from corporate assets—not from funds belonging to the State. No one of them was an officer of the State in the strict sense of that term. The business about which they were employed was not one utilized by the State in the discharge of her essential governmental duties. The corporations in liquidation were private enterprises; their funds were the property of private individuals."

The case of Rogers v. Graves, supra, is in point and we think decisive as to the rule of law applicable here. Rogers

was general counsel for the Panama Railroad Company, a corporation created under the laws of New York for the purpose of building and operating a railroad across the Isthmus of Panama. Rogers reported his salary from the corporation in making his state tax return but claimed it as exempt. The State Tax Commission required payment of the tax thereon and it was paid under protest. The exemption was claimed on the ground that the Panama Railroad Company was a wholly-owned instrumentality of the United States, engaged in maintaining, operating and protecting the Panama Canal; that as such the Company was exempt from state taxation and also salaries paid its officers and employes were exempt. The court stated the problem to be:

"In order to reach a correct determination of the question whether the railroad company is exercising functions of a governmental character, the railroad and ships are to be considered not as things apart, but in their relation to the Panama Canal; and it is clear that the railroad and ships after the completion of the canal, continued to be used chiefly as adjuncts to its management and operation. The question, therefore, to be answered is whether the canal is such an instrumentality of the federal government as to be immune from state taxation; and, if so, are the operations of the railroad company so connected with the canal as to confer upon the company a like immunity?"

After reviewing the history and development of operations resulting in the building and operating of the Panama Canal, the court said:

"That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt. California v. Central Pacific Railroad Co., 127 U. S. 1, 39; Luxton v. North River Bridge Co., 153 U. S. 525."

The court concluded:

[fol. 43] "The railroad company being immune from state taxation, it necessarily results that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

We have quoted extensively from the Brush, Graves, Therrell and Dravo Cases because they contain the latest expressions of the Supreme Court of the United States with respect to three phases of the general problem; that is, taxation of salaries of a local officer by the Federal Government, of the gross income of a government contractor by the state, and of an employe of a corporate instrumentality of the government by a state. This leads us to an investigation of the character of the R. F. C. and the R. A. C. C. to determine whether or not they are instrumentalties used to enable the Federal Government to perform governmental functions. Plaintiff in his brief states: "The determination of the case, therefore, depends upon whether these corporations are of such a nature as to be considered in the same way as the United States itself."

The evidence is stipulated and there is no dispute as to the facts. The difference between the parties arises because of the different interpretations of the facts. Plaintiff contends that the corporations are instrumentalities of the government, engaged exclusively in performing governmental functions. The Tax Commission takes the view that the government by means of these corporations has entered the field of business in that through them it is lending money for profit in competition with private banking and other lending agencies and that their functions are not essentially governmental at all.

The R. F. C. was created by Congress on recommendation of President Herbert Hoover, early in the period commonly called the depression. It was patterned after the War Finance Corporation which had been set up and used during the World War. The title to the act creating it is, "An act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and for other purposes." Its capital stock of $500,000,000 was all subscribed by the United States. The corporation is controlled by a board of directors, one of whom is the Secretary of the Treasury, and the other six members are appointed by the President with the advice and consent of the Senate. It has the same franking privilege for its mail as the various departments of the government, and plaintiff has continuously used that franking privilege in working for both this and the other corporation. It has the right to avail itself, free of charge, of informa-

tion, services, officers, and employes of boards, commissions, and executive departments of the United States Government. It is authorized, with the approval of the Secretary of Treasury, to issue its negotiable obligations, which are fully and unconditionally guaranteed by the United States, and if not paid such obligations are to be paid by the United States Treasury. It is authorized to act as a depositary of public moneys and to be employed as financial agent of the Federal Government. It was organized for a limited period, and its corporate life has been extended since by act of Congress. Its liquidation was provided for, and all balances remaining unexpended after payment of debts are to be paid into the United States Treasury.

Plaintiff testified that the Salt Lake Agency performed the functions of the corporation in the State of Utah, the eastern portion of Nevada, and the southern part of Idaho; that in traveling by train on business connected with the corporation he has paid and been allowed the reduced rates allowed government employes; that any profits made by the corporation would be the government's and any losses would have to be paid by the government; that none of its stock had been owned or held by any person other than the United States Government; that where the R. F. C. became involved in litigation the United States was a party and the action brought in the joint names of the United States of America and the Reconstruction Finance Corporation. Mr. Van Cott testified, and his testimony is not questioned, that his salary is and has been paid by check drawn directly on the United States Treasury.

During the years 1932 and 1933, business was paralyzed and many institutions considered sound were hard pressed [fol. 44] for funds to meet the ordinary demands of business. Banks and other credit institutions turned to the R. F. C. for aid. The loans made were not of a type that could be or would be made by ordinary banking concerns.

The Supreme Court of the United States has not directly decided the question we are now considering. However, that court expressed itself respecting the character of the R. F. C. in Baltimore National Bank v. State Tax Commission of Maryland, 297 U. S. 209, 56 S. Ct. 417, 80 L. Ed. 586, as follows:

"The Reconstruction Finance Corporation was organized in 1932 to give relief to financial institutions in a na-

tional emergency and for other and kindred ends. Act of January 22, 1932, 47 Stat. 5, Act of July 21, 1932, 47 Stat. 709, 15 U. S. C., c. 14 [see 15 U. S. C. A., Sec. 601, et seq.]. At the time of its creation and continuously thereafter the United States has been and is the sole owner of its shares. The purpose that it has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as the result of the great depression. We assume, though without deciding even by indirection, that within McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579, a corporation so conceived and operated is an instrumentality of government without distinction in that regard between one activity and another."

In that case the court held that the United States statutes permitted taxation of national bank stock held by the R. F. C. The Congress, however, promptly passed an act making such stock held by the R. F. C. nontaxable. It would seem to follow that the Reconstruction Finance Corporation is an instrumentality of government, exercising governmental functions.

As to the Regional Agricultural Credit Corporation, the same conclusion will follow. The Reconstruction Finance Corporation Act authorized the R. F. C. to create a regional agricultural credit corporation in each of the twelve Federal Land Bank Districts, the capital of which was to be subscribed by the R. F. C. and paid for out of the unexpended balance of amounts which were allocated and made available to the Secretary of Agriculture under the R. F. C. act. In 1933, the President of the United States transferred the jurisdiction of the R. A. C. C. from the R. F. C. to the Farm Credit Administration. Ever since that time the direction of the R. A. C. C. has been under the Farm Credit Administration of the United States Government. During the years it has been in existence, the R. A. C. C. has loaned a total of approximately $40,000,000 in Wyoming, Utah, Arizona, Idaho, Nevada, and California. The Salt Lake office has loaned approximately $20,000,000 of this amount. Most of this has been received back in liquidation, the proceeds of which go to the Treasury of the United States. The financing of the R. A. C. C. has at all times

been done by the R. F. C. out of funds appropriated by Congress, which funds are in the Treasury of the United States. It has no funds of its own and never has had. It has no bank account. Certain of its officials are authorized to draw on the Treasury of the United States. Its funds are allocated and appropriated each year by act of Congress. It is required to make up an advance budget for the fiscal year and that is consolidated into the budget of the United States Government. The plaintiff is paid out of such budget by checks drawn on the Treasury of the United States.

During the years 1932 and 1933, the R. A. C. C. was largely engaged in loaning moneys to livestock raisers who had been in distressed circumstances. But early in 1934 the R. A. C. C. ceased to make further loans and since that time has been in liquidation. The proceeds of liquidation are deposited to the credit of the Treasurer of the United States in the Federal Reserved Bank. After the money reaches the Federal Reserve Bank, the R. A. C. C. has no power to draw on the funds. If there is any profit derived from the operation of the R. A. C. C., it will go to the Treasury of the United States.

Respondent cites and relies on the cases of Pomeroy v. State Board of Equalization, 99 Mont. 534, 45 P. (2d) 316; [fol. 45] Clinton v. State Tax Commission, (Kan.) 71 P. (2d) 857; and Parker v. Mississippi State Tax Commission, (Miss.) 174 So. 567 (Certiorari denied by U. S. Supreme Court, 82 L. Ed. 105). In the Pomeroy Case the Montana court had before it the question of whether the salary of a R. F. C. officer as part of his net income was subject to the state income tax. The case holds that the officers and employes of the R. F. C. are not employes of the United States and that their salaries are not exempt from computation of gross income for taxation purposes under a statute providing that gross income for tax purposes does not include "salaries, wages and other compensations received from the United States by officials or employes thereof". This case was decided May 4, 1935, which was prior to the decision of the Supreme Court of the United States in Rogers v. Graves, supra, decided January 4, 1937, and before the decision in Brush v. Commissioner of Internal Revenue, supra, Mar. 15, 1937. We can hardly imagine that the Pomeroy Case would have resulted

had, it is ordered that a rehearing be, and the same is, denied.

[fol. 49] IN SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD

To Mr. L. M. Cummings, Clerk of the Supreme Court of the State of Utah:

You are hereby requested to make a transcript of the record in this cause to be filed in the Supreme Court of the United States, pursuant to a petition for Writ of Certiorari, and to include in such transcript of the record the following:

1. Individual income tax return of Waldemar Q. Van Cott to the State of Utah for the calendar year 1935, dated March 14, 1936.

2. Notice of proposed income tax deficiency for the calendar year 1935, dated May 25, 1935, together with schedules.

3. Amended Petition for Redetermination of Income Tax, dated May 27, 1936, filed May 28, 1936.

4. Stipulation of Facts covering proceedings at the first hearing of W. Q. Van Cott before the State Tax Commission, dated June 18, 1936.

5. Stipulation regarding praecipe for and transcript of record, dated November 1, 1938.

6. Exhibit 2 before the State Tax Commission, being the Charter of the Regional Agricultural Credit Corporation of Salt Lake City, Utah.

7. Exhibit II-A before the State Tax Commission of Utah, being a pamphlet published by the United States Government Printing Office at Washington, dated January, 1936, being a "Summary of the Activities of the Reconstruction Finance Corporation and Its Condition as of December 31, 1935".

8. Exhibit 3 before the State Tax Commission of Utah, being an order of the directors of the Reconstruction Finance Corporation.

9. Minute entry of the State Tax Commission, dated December 31, 1936.

10. Petition for Writ of Certiorari in the Supreme Court of the State of Utah, dated January 26, 1937.

[fol. 50] 11. Writ of Review from the Supreme Court of the State of Utah, dated January 27, 1937.

12. Opinion of the Supreme Court of the State of Utah, dated May 6, 1938.

13. Decree of the Supreme Court of the State of Utah, dated May 6, 1938.

14. Order denying petition of the defendants for a rehearing, dated July 5, 1938.

Said transcript is to be prepared as required by law and the rules of this Court and the rules of the United States Supreme Court concerning appeals from State Courts and to be immediately filed in the office of the Clerk of the Supreme Court of the United States in Washington, D. C.

Dated this 9 day of November, 1938.

Irwin Arnovitz, Chairman of State Tax Commission of Utah; Joseph Chez, Attorney General of Utah, by John D. Rice, Deputy; Alfred Klein, Attorney for State Tax Commission of Utah, Attorneys for Defendants.

Service of the above Clerk's Praecipe for Transcript of Record is acknowledged this 9th day of November, 1938, and I hereby stipulate that the foregoing list may constitute the entire transcript of the record in this cause, to be filed in the Supreme Court of the United States.

W. Q. Van Cott, Attorney for Plaintiff.

[fol. 51] IN SUPREME COURT OF UTAH

[Title omitted]

NOTICE OF FILING OF PRAECIPE

To W. Q. Van Cott, Plaintiff and Attorney Per se:

You will please take notice that on the 9th day of November, 1938 the undersigned duly filed with the Clerk of this Court a Clerk's Praecipe for Transcript of Record to be submitted to the Supreme Court of the United States on

petition for Writ of Certiorari in the above cause, a copy of which Clerk's Praecipe is herewith served upon you.

Dated this 9th day of November, 1938.

Irwin Arnovitz, Chairman of State Tax Commission of Utah; Joseph Chez, Attorney General of Utah, by John D. Rice, Deputy; Alfred Klein, Attorney for State Tax Commission of Utah, Attorneys for Defendants.

Service of the foregoing Notice acknowledged this 9th day of November, 1938.

W. Q. Van Cott, Attorney for Plaintiff.

[fol. 52] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioners in the above entitled cause, and good cause having been shown,

It Is Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of sixty days from this date.

Pierce Butler, Associate Justice of the Supreme Court of the United States.

Dated this third day of October, 1938.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 3, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Utah is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 491

THE STATE TAX COMMISSION OF UTAH, and IRWIN ARNOVITZ, R. E. HAMMOND, H. P. LEATHAM and J. WILL KNIGHT, members thereof, *Petitioners*,

vs.

W. Q. VAN COTT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF

IRWIN ARNOVITZ,
Chairman of State Tax Commission of Utah

JOSEPH CHEZ, Attorney General of Utah,
By JOHN D. RICE, Deputy,

ALFRED KLEIN,
Attorney for State Tax Commission of Utah.
Attorneys for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No.____

THE STATE TAX COMMISSION OF UTAH, and
IRWIN ARNOVITZ, R. E. HAMMOND, H. P. LEATHAM and
J. WILL KNIGHT, members thereof, *Petitioners*,

vs.

W. Q. VAN COTT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, the State Tax Commission of Utah and Irwin Arnovitz, R. E. Hammond, H. P. Leatham and J. Will Knight, members thereof, pray that a Writ of Certiorari issue to review the decree or decision entered May 6, 1938, in the Supreme Court of the State of Utah in the above entitled cause (R. 63) (Utah) 79 Pacific (2d) 6. A petition for rehearing was duly made to that court on the 11th day of June, 1938, and was denied on the 5th day of July, 1938. (R. 63-64.)

The whole record is before this Honorable Court on this petition for a Writ of Certiorari, which is made within the time limit prescribed by statute and the rules of this Court. The Supreme Court of the State of Utah is the highest court of law and equity in the State of Utah, and said decree sought to be reversed is a final decree of said court.

QUESTION PRESENTED AND STATEMENT OF FACTS

The sole question presented in this action is whether or not the respondent's salary as agency counsel for the Reconstruction Finance Corporation, hereinafter called the R. F. C., and as counsel for the Regional Agricultural Credit Corporation of Salt Lake City, hereinafter called the R. A. C. C., are either or both taxable income under the Utah State Income Tax Law, Chapter 14, Title 80, Revised Statutes of Utah, 1933, as amended. A determination of this federal question mainly depends: first, on whether these two corporations exercise essential federal governmental functions known and contemplated at the time our Constitution was adopted; second, whether the salaries are exempt because of any established federal constitutional privilege or principle; third, whether these two agencies are of such a character and so intimately associated with the performance of an indispensable function of the federal government that any taxation of salaries paid by them would threaten a sufficient interference with such a function of the federal government as to be considered beyond the reach of the State taxing power; fourth, whether the burden of the tax is so direct that it tends to impede and burden the federal government in performing an essential governmental function; and, fifth, whether the taxation of the salaries of a lawyer of the two agencies has the effect of interfering with the exercise of an essential federal governmental function.

The respondent, in his income tax return to the State of Utah for the year 1935, claimed an exemption of his salaries received from the R. F. C. and the R. A. C. C.-(R.

1.) The R. F. C., briefly, was created by Congress, patterned after the War Finance Corporation, and to give relief to financial institutions by the rehabilitation of finance, industry and commerce. The R. A. C. C. was largely engaged in loaning moneys to livestock raisers in distressed circumstances. Any profits derived from the operation of either go to the Treasury of the United States. The Utah State Tax Commission made a finding of respondent's income tax liability and proposed an income tax deficiency based upon a net income which included the salaries in question. (R. 3.) It was the position of the Tax Commission in including the salaries as taxable income that these federal corporations were not engaged in performing essential governmental functions because the government, by means of these corporations lending money for profit, had entered into competition with private banking and lending agencies. The cause came to the Supreme Court of the State of Utah on certiorari from the decision of the Tax Commission denying a redetermination of the income tax deficiency.

In his argument before the Utah Supreme Court the respondent herein maintained that the salaries in question were exempt from taxation because of an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the states. The petitioners herein maintained that the activities of the R. F. C. and the R. A. C. C. are not essential governmental functions, but rather functions of a proprietary nature, and that, therefore, there was no federal principle of immunity. The Supreme Court of the State of Utah reversed the order of the Utah State Tax Commission and remanded the cause to the Tax Commission with instructions to redetermine the tax and to allow the deductions claimed by the respondent, for the reason that the salaries were received for services rendered in connection with the exercise of an essential governmental

function, because of the Utah Supreme Court's interpretation of certain decisions of this Honorable Court. It is submitted that the Supreme Court of Utah decided this federal question contrary to the applicable decisions of this Honorable Court.

STATUTES INVOLVED

The statutes of the State of Utah, material to this action, contained in the Utah Income Tax Law, Chapter 14, Title 80, Revised Statutes of Utah, 1933, as amended by Chapter 90, Laws of Utah, 1935, are as follows:

Sec. 80-14-2, R. S. Utah 1933, as amended:

"There shall be levied, collected and paid for each taxable year upon the net income of every resident of the State, a tax equal to the sum of the following:

"(1) One per cent of the first $1,000 of the amount of net income in excess of the credits against net income provided in Section 80-14-7.

"(2) Two per cent of the next $1,000 of such excess amount.

"(3) Three per cent of the next $1,000 of such excess amount.

"(4) Four per cent of the next $1,000 of such excess amount.

"(5) Five per cent of the remainder of such excess amount."

Sec. 80-14-3 reads:

"'Net income' means the gross income computed under Section 80-14-4 less the deductions allowed by Section 80-14-5."

In defining what consitutes "gross income," Subsec. (2) (g) of Sec. 80-14-4, listing exemptions, reads as follows:

"(g) Amounts received as compensation, salaries or wages from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function."

RULING OF THE COURT BELOW

The Supreme Court of the State of Utah decreed (Utah, 79 Pacific (2d) 6) (R. 63) that the R. F. C. and the R. A.

C. C. are instrumentalities used to enable the Federal Government to perform essential federal governmental functions, and that, therefore, in view of the doctrine of New York ex rel. Rogers vs. Graves, 299 U. S. 401, 57 S. Ct. 269, the salaries received for services rendered to them were exempt from state income taxation. The order of the Tax Commission denying the petition of the respondent herein for a redetermination of an income tax deficiency based upon the inclusion of salaries from the R. F. C. and the R. A. C. C. was reversed. A petition for rehearing was duly and regularly made to the Supreme Court of the State of Utah on the 11th day of June, 1938, and was denied on the 5th day of July, 1938. (R. 63-64.)

Your petitioners have presented to this Honorable Court and have filed herein a duly certified transcript of the record of this cause as the same appears in the Supreme Court of the State of Utah.

REASONS FOR GRANTING THE PETITION

It is the contention of the petitioners that the Supreme Court of the State of Utah has decided a federal question in a way not in accord with the applicable decisions of this Honorable Court, by holding that the R. F. C. and the R. A. C. C. were performing essential governmental functions and that the salaries received by the respondent for services rendered to them were not subject to income taxation by the State of Utah. This Honorable Court, in one of its latest expressions on the subject of taxation of government employees, namely, the case of Helvering, Commissioner of Internal Revenue vs. Gerhardt, decided May 23, 1938, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 962, applies a new theory of the rules of taxation to the question of immunity of state employees from federal income taxation. It was there held that no federal constitutional privilege or principle applies to exempt salaries of state employees from federal income taxation "when the burden on the state is so speculative and uncertain that if allowed it would re-

strict the federal taxing power" nor when the activities are "thought not to be essential to the preservation of state governments."

Thus the United States Supreme Court rejected the doctrine of immunity from the federal income tax of salaries received by employees of the state engaged in the steady expansion of activities of the state government into new fields not known at the time our Constitution was adopted. It is contended by the petitioners that this Honorable Court also rejected the reciprocal doctrine of immunity as applied to the immunity from state taxation of salaries received by employees of the R. F. C., the R. A. C. C. and similar activities of the Federal Government, engaged in this expanding function of governmental activities into new fields not known at the time of the adoption of our Constitution, which enterprises were once exclusively conducted by private individuals, when the burden thereon is conjectural and not substantial. It is contended that the decree of the Supreme Court of the State of Utah is not in accord therewith. That conflict was pointed out to the Utah Supreme Court in the Petition for Rehearing and it was submitted to the Utah Supreme Court that its decision did not follow the applicable decisions of this Honorable Court. Despite that fact, rehearing was denied. (R. 63-64.)

In the case of Allen vs. Regents of the University System of Georgia, 82 L. Ed. 975, 304 U. S. ....., 58 S. Ct. 980, this Court held that admissions to athletic contests were subject to the federal tax provided by Section 500(a)(1) of the Revenue Act of February 26, 1926, as amended by Section 711 of the Revenue Act of June 6, 1932.

This Honorable Court there proceeded on the theory that the conduct of exhibitions for admissions paid by the public is not such a function of state government as to be free from the burden of a nondiscriminatory tax laid on all admissions to public exhibitions for which an admission fee is charged, however essential a system of public education is to the existence of the state. This Court said that the

state had embarked in a business having incidents of similar enterprises usually conducted for private gain. That, we think, is the very situation here. The United States Government, in creating the R. F. C. and the R. A. C. C., has embarked in a business having the incidents of similar enterprises usually conducted for private gain. These functions performed by the R. F. C. and R. A. C. C., are not such necessary governmental functions of the federal government that a tax laid upon the salary of the lawyer for these agencies will result in curbing the continued existence of any essential federal governmental function.

For these reasons it is respectfully submitted that this petition should be granted.

IRWIN ARNOVITZ,
Chairman of State Tax Commission of Utah

JOSEPH CHEZ, Attorney General of Utah,
By JOHN D. RICE, Deputy,

ALFRED KLEIN,
Attorney for State Tax Commission of Utah,
Attorneys for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

THE STATE TAX COMMISSION OF UTAH, and IRWIN ARNOVITZ, R. E. HAMMOND, H. P. LEATHAM and J. WILL KNIGHT, members thereof, *Petitioners*,

vs.

W. Q. VAN COTT.

PETITIONERS' BRIEF

OPINION OF COURT BELOW

The opinion of the court below, in which the decree is sought to be reversed, was delivered by the Supreme Court of the State of Utah, the highest court of law and equity in the State of Utah. It was written by Chief Justice William H. Folland and unanimously concurred in by Justices Ephraim Hanson, David W. Moffat, James H. Wolfe and Martin M. Larson. It appears on pages 47 to 63 of the Record and is reported at 79 Pacific (2d) 6.

JURISDICTION

The jurisdiction of this court is invoked under Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, c 229 (43 Stat. 937) 28 U. S. C. A. 344. The decree of the Supreme Court of the State of Utah, which decree is sought to be reversed, was entered May 6, 1938. (R. 63.) Petition for rehearing was duly and regularly filed on June 11, 1938, and denied by that court on July 5, 1938. (R. 63-64.) An extension of sixty days for filing a petition for Writ of Certiorari was granted by the Hon. Pierce Butler on October 3, 1938. (R. 66.) The petition to the Supreme Court of the United States for a Writ of Certiorari to the Supreme Court of the State of Utah is a part of and precedes this Brief.

This cause is an action of law to determine whether or not the respondent's salaries as agency counsel for the Reconstruction Finance Corporation, hereafter called the R. F. C. and as counsel for the Regional Agricultural Credit Corporation of Salt Lake City, hereafter called the R. A. C. C., are either or both taxable income under the Utah State Income Tax Law. It was contended and determined by the Supreme Court of the State of Utah that Subsection (2)(g) of Section 80-14-4, Revised Statutes of Utah, 1933, providing that "amounts received as compensation, salaries or wages from the United States * * * for services rendered in connection with the exercise of an essential governmental function" shall not be included in gross income and shall be exempt from state income taxation, was applicable to the salaries received by the respondent from the R. F. C. and the R. A. C. C., because these federal agencies were exercising essential governmental functions.

The Utah Supreme Court refused to adopt the position of the petitioners, which we contend to be legal and proper, that the activities carried on by the respondent are clearly of such a character that they were not received in the exercise of an essential governmental function, but were rather received by a federal employee engaged in an expanding function of governmental activities into new fields not known at the time of the adoption of our Constitution, when the burden of the income tax upon the agencies is conjectural and does not substantially preclude or burden the agencies' powers and duties.

The Tax Commission repeatedly contended before the Supreme Court of the State of Utah that a decision not in accord with its income tax deficiency would be deciding a federal question contrary to the applicable decisions of this Honorable Court. The decree of the Utah Supreme Court directly held otherwise and based its entire decision on its interpretation of this Honorable Court's decisions. We firmly submit that that court erroneously interpreted the applicable decisions.

It is submitted that certiorari is a proper remedy in petitioning that a decision on a federal question of immunity from taxation of governmental employees be reviewed by this Honorable Court. The cases in accord are numerous. It should suffice to cite but a few of the more recent applicable cases in which certiorari was allowed to review such a decision: Brush vs. Commissioner of Internal Revenue, 300 U. S. 352, 81 L. Ed. 433, 57 S. Ct. 495; Helvering vs. Powers, 293 U. S. 214, 55 S. Ct. 171, 79 L. Ed. 291; Helvering vs. Therrell, 303 U. S. 323, 58 S. Ct. 539, 82 L. Ed. 537 (decided February 28, 1938); and Helvering vs. Gerhardt, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 962.

FACTS

The facts already have been set out sufficiently in the Petition for a Writ of Certiorari. We here emphasize certain of these facts, amplifying on a discussion of the nature and operations of the R. F. C. and the R. A. C. C. The respondent, in his income tax return for the calendar year 1935, claimed as exempt his salary as agency counsel for the R. F. C. and the R. A. C. C. on the ground that both of these corporations were instrumentalities of the Federal Government, exercising essential federal governmental functions. The petitioners take the view that the Federal Government, by means of these corporations, has entered the field of business, and that, through them, is lending money for profit in competition with private banking and other lending agencies, and that their functions are, therefore, not essentially governmental.

The question for determination, therefore, is whether W. Q. Van Cott's salary as agency counsel for the R. F. C., and his salary as counsel for the R. A. C. C. are either of them or both taxable income under the Utah Income Tax Law, Chapter 14, Title 80, Revised Statutes of Utah, 1933, as amended by Chapter 90, Laws of Utah, 1935.

The material part thereof, Subsection (2)(g) of Section 80-14-4, Revised Statutes of Utah, 1933, reads as follows:

Exclusions from Gross Income

"(2) The following items shall not be included in gross income and shall be exempt from taxation under this chapter:"

Tax-Free Salaries

"(g) Amounts received as compensation, salaries or wages from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function."

The R. F. C. was created by Congress on recommendation of President Herbert Hoover early in the period commonly called the Depression. The title to the act creating it is "An Act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce and industry, and for other purposes." The capital stock of $500,000,000 was all subscribed by the United States. The corporation is controlled by a board of directors, one of whom is the Secretary of the Treasury, and the other six members are appointed by the President, with the advice and consent of the Senate. It has the same franking privilege for its mail as the various executive departments of the Government. It is authorized, with the approval of the Secretary of the Treasury, to issue its negotiable obligations which are fully and unconditionally guaranteed by the United States. During the years 1932 and 1933, business was paralyzed, and many institutions considered sound were hard pressed for funds to meet the ordinary demands of business. Banks and other credit institutions turned to the R. F. C. for aid. The purpose that it is aimed to serve is not profit to the Government, but the rehabilitation of finance for industry and commerce, though profit may at times result from one or more of its activities. Such profit realized goes to the Treasury of the United States.

The R. A. C. C. has been engaged under the Farm Credit Administration of the United States. The capital of this agency was subscribed by the R. F. C., and paid for out of the unexpended balance of amounts which were allocated

and made available to the Secretary of Agriculture under the R. F. C. Act. During the years it had been in existence, numerous sums of money have been loaned in Wyoming, Utah, Arizona, Idaho, Nevada and California. Most of this money has been received back in liquidation, the proceeds of which go to the Treasury of the United States. It has no bank account. Its funds are allocated and appropriated each year by acts of Congress. During the years 1932 and 1933, the R. A. C. C. was largely engaged in loaning moneys to large stock raisers who had been in distressed circumstances, but early in 1934 the R. A. C. C. ceased to make further loans, and since that time has been in liquidation. If there is any profit derived from the operation of the R. A. C. C., it will go to the Treasury of the United States.

ARGUMENT

The argument in this case, though divided into three sections, each concerns the subject matter of the doctrine of immunity from taxation, as applied to our dual system of government, in which the individual states are sovereign powers as well as the Federal Government. Certain principles or rules of law have been laid down on the subject matter of the exemption from taxation of the instrumentalities, means and operations, whereby the one sovereign exercises its governmental powers.

POINT I

A Conflict of Decisions, as Between the Supreme Court of Montana, the Highest Court of the State of Montana, and the Supreme Court of the State of Utah, Both on the Exact Subject Matter on the Exemption from State Income Taxation of Salaries Received from the R. F. C., Should be Resolved in Favor of the Decree of the Montana Court Rather than the Utah Supreme Court.

The Supreme Court of Montana, in the case of Pomeroy vs. State Board of Equalization, 99 Montana 534, 45 Pa-

cific (2d) 316, construed a statute excluding from gross income "salaries, wages and other compensation received from the United States or officers or employees thereof," and held that compensation received by an employee of the R. F. C. was not excluded under this exemption. The Utah statute, cited heretofore, in providing for exclusion from taxation, does not go nearly as far as the Montana statute, in that the Utah statute only exempts salaries received for services performed in the exercise of an essential governmental function. There is no attempt made under the Utah statute to exclude from gross income salaries of all of the officers of the United States, or employees thereof. The respondent herein claims that the Montana case is clearly wrong, whereas the contention of the petitioners is that the Montana court was correct, in view of the recent decision of this Honorable Court in the case of Helvering vs. Gerhardt, supra.

POINT II

The Salaries Received by the Respondent from the R. F. C. and the R. A. C. C. were not Received in Connection with the Exercise of an Essential Federal Governmental Function Known and Contemplated at the Time our Constitution was Adopted, and are, Therefore, Not Within the Exemption of Subsection (2)(g) of Section 80-14-4, Revised Statutes of Utah, 1933.

The broad general rule of law, which settled the question that under our dual system of government one sovereign cannot tax the instrumentality of another sovereign, is the case of McCulloch vs. State of Maryland, 4 Wheaton's Reports 316. That case is of interest in the problem now before this Court only as a matter of historical background. Under the facts in the McCulloch vs. Maryland case, the state was attempting to directly tax a bank established by the Congress of the United States, and as we understand this case, Chief Justice Marshall held that Congress could provide that a state could not tax an instrumentality of the Federal Government; that Congress could exercise its

power by virtue of the constitutional provisions which say that the acts of Congress should be the supreme law of the land. We have no such question in this case because we are not attempting to tax directly either the Reconstruction Finance Corporation or the Regional Agricultural Credit Corporation. We are also not attempting in any way to tax either their income or their property.

As an outgrowth of the case of McCulloch vs. Maryland, there came two other cases in which the doctrine enunciated in McCulloch vs. Maryland, supra, was extended. The first was Dobbins vs. Erie County, 16 Pet. 435; 10 L. Ed. 1022. In the Dobbins case this Court held that Erie County could not impose for county purposes, a tax upon the salary of an employee of the United States Revenue service.

The second case, which is based upon McCulloch vs. Maryland and which we deem to be an extension of the doctrine there recited, is Collector vs. Day, 11 Wallace 113, 20 L. Ed. 122. In Collector vs. Day, the converse to the Dobbins case was decided. It held that the United States could not impose a tax upon the income of a judicial officer of a state, because a judge was a necessary instrument in the performance of the functions of the state.

We believe that the decisions in Dobbins vs. Erie County, supra, and Collector vs. Day, supra, extend the rule laid down in the McCulloch vs. Maryland, because the taxes levied in the former cases cited were levied against the individual employed and not directly against the instrumentality as in McCulloch vs. Maryland.

This Court next definitely qualified the cases of Collector vs. Day and Dobbins vs. Erie County in the case of South Carolina vs. U. S., 26 S. Ct. 110, 199 U. S. 437, 59 L. Ed. 26, in distinguishing between a necessary governmental function and an activity of the state in a proprietary capacity. The state of South Carolina maintained a liquor monopoly, established distilleries and prohibited the wholesale and retail sale of liquor and private sale by other than state dispensors. The United States levied an excise

tax upon the spirituous liquors. The state of South Carolina claimed that the liquor dispensaries, being state instrumentalities, were not subject to any tax levied by the Federal Government, and relied as authority for this proposition on the case of McCulloch vs. Maryland. In deciding what constituted a necessary governmental function, this Court said:

> "Now, if it be well established, as these authorities say, that there is a clear distinction as respects responsibility for negligence between the powers granted to a corporation for governmental purposes and those in aid of private business, a like distinction may be recognized when we are asked to limit the full power of imposing excises granted to the national government by an implied inability to impede or embarrass a state in the discharge of its functions. It is reasonable to hold that while the former may do nothing by taxation in any form to prevent the full discharge by the latter of its governmental functions, yet, whenever a state engages in a business which is of a private nature, that business is not withdrawn from the taxing power of the nation.
>
> "For these reasons we think that the license taxes charged by the Federal Government upon persons selling liquor are not invalidated by the fact that they are the agents of the state, which has itself engaged in that business."

This Court will recognize that in the above case it is a tax directly against the business of the state and not against the salaries of any person in the employ of the liquor dispensaries. Certainly if the Federal Government can levy an excise upon the business, they can levy a tax upon the incomes received by persons in the conduct of that business.

We fail to see any difference between the state's entering the liquor business and the Federal Government entering the banking business, to make loans to corporations and individuals in the same manner as any commercial bank would make loans. On loans taken by persons in the Re-

construction Finance Corporation, security is given, interest is paid and in every way the business is conducted as though it were done with a private banking house.

It might be argued by the respondent in this case, that because of the economic conditions existing in the country at the time the Reconstruction Finance Corporation was organized, it makes that organization a necessary governmental function. We do not believe that such an argument is tenable, because in the South Carolina vs. U. S. case, supra, this Court recognized that the sale and control of liquor by a state is in the exercise of the police power of the state and is based upon the general public welfare. The whole test, as we see it in the cited case, is that the state is acting in a proprietary capacity in a private business and is not conducting a necessary governmental function. The same is applicable with the R. F. C. and the R. A. C. C. The holding, in the case of the State of South Carolina vs. U. S., supra, was sustained on practically the same grounds and under the same reasoning in the case of Ohio vs. Helvering, 292 U. S. 360, 54 S. Ct. 725, 78 L. Ed. 1307.

The term "essential governmental functions" first appears in the case of Flint vs. Stone Tracy Co., 31 S. Ct. 342, 220 U. S. 107. There this court, in discussing the income tax levied upon corporations, says the following relative to the imposing of taxes upon essential governmental functions:

> "We come to the question, Is a so-called public-service corporation, such as the Coney Island and Brooklyn Railroad Company, in case No. 409, and the Interborough Rapid Transit Company, No. 442, exempted from the operation of this statute? In the case of South Carolina vs. United States, 199 U. S. 437, 50 L. Ed. 261, 26 S. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, this court held that when a state, acting within its lawful authority, undertook to carry on the liquor business, it did not withdraw the agencies of the state, carrying on the traffic, from the operation of the in-

ternal revenue laws of the United States. If a state may not thus withdraw from the operation of a federal taxing law a subject-matter of such taxation, it is difficult to see how the incorporation of companies whose service, though of a public nature, is, nevertheless, with a view to private profit, can have the effect of denying the federal right to reach such properties and activities for the purposes of revenue.

"It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like. These objects are often accomplished through the medium of private corporations, and though the public may derive a benefit from such operations, the companies carrying on such enterprises are nevertheless private companies, whose business is prosecuted for private emolument and advantage. For the purpose of taxation they stand upon the same footing as other private corporations upon which special franchises have been conferred.

"The true distinction is between the attempted taxation of those operations of the states essential to the execution of its governmental functions, and which the state can only do itself, and those activities which are of a private character. The former, the United States may not interfere with by taxing the agencies of the state in carrying out its purposes; the latter, although regulated by the state, and exercising delegated authority, such as the right of eminent domain, are not removed from the field of legitimate federal taxation."

In the case of Metcalf & Eddy vs. Mitchell, 269 U. S. 514, 46 S. Ct. 172, 70 L. Ed. 384, decided in 1926, it was held that a tax may be imposed by the Federal Government upon the income of an engineer who contracted his services to the state in connection with water supply and sewage disposal projects. It was further held that the performance of the work by the engineer was not impaired by the tax. Another case which throws some light upon the holdings of the Supreme Court is Blair vs. Matthews, 29 F. (2d) 892. This decision was reversed by the Supreme Court upon the authority of Metcalf & Eddy vs. Mitchell, supra;

Howard vs. Commissioner of Internal Revenue, 29 F (2d) 895 (reversed without opinion in 1929 by the Supreme Court) 280 U. S. 596, 50 S. Ct. 87, 74 L. Ed. 593; Ogilvie vs. Commissioner of Internal Revenue, 36 F. (2d) 473; Roberts vs. Commissioner of Internal Revenue, 44 F. (2d) 168. In all of these cases it has been held by the courts that employees in various capacities paid by the state or its subdivisions are subject to the federal income tax. Under these decisions, we do not believe that it can be contended by this respondent that the question which confronts this court is whether or not this plaintiff is paid by the Treasurer of the United States or is employed by a corporation whose entire capital stock is owned by the Federal Government.

But a new test of immunity of essential governmental functions has been laid down by this Honorable Court. It is not whether an instrumentality is engaged in an essential federal governmental function, but the new test is whether it is engaged in an essential governmental function known and contemplated at the time our Constitution was adopted. This new test is forcibly brought out in the case of Guy T. Helvering vs. Gerhardt, decided May 23, 1938, 304 U. S. 405, 58 S. Ct. 969, 82 L. Ed. 962. No doubt this most recent case is well fixed in the minds of all of us so that there is no great necessity for detail.

In the Gerhardt case, the Port Authority, a bi-state corporation, was created by compact between New York and New Jersey, and approved by the Congress of the United States by Joint Resolution of August 23, 1921, c. 77, 42 Stat. 174. In conformity to a comprehensive plan for improving the Port of New York, lying partially within each state and facilitating its use, and pursuant to further legislation of the two states, several bridges and tunnels were built, financed in a large part by funds advanced by the two states and by the Port Authority's issue and sale of bonds. The Port Authority's "projects are all said to be operated in behalf of the two states and in the interest of

the public and none of its profits enure to the benefit of private persons. Its property and the bonds and other securities issued by it are exempt by statute from state taxation. * * * Statutes of New York and New Jersey relating to the various projects of the Port Authority declare that they are 'in all respects for the benefit of the people of the two states, for the increase of their commerce and prosperity, and for the improvement of their health and living conditions, and the Port Authority shall be regarded as performing a governmental function in undertaking the said construction, maintenance and operation and in carrying out the provisions of law relating to the said (bridges and tunnels) and shall be required to pay no taxes or assessments upon any of the property acquired by it for the construction, operation and maintenance of such' bridges and tunnels."

Upon these facts this Honorable Court held that the imposition of the Federal Income Tax upon the salaries of the employees of the Port Authority neither precluded nor threatened unreasonably to obstruct any function essential to the continued existence of the state government. Further, it concluded that if the immunity were allowed, its effects would be an inadmissable restriction upon the taxing power granted to the Federal Government by the Constitution of the United States. It is noteworthy that this Court, in the majority opinion of Justice Stone, lays great stress upon the steady expansion in activity of the state governments into new fields not known at the time our Constitution was adopted or the decision of McCulloch vs. Maryland rendered. This Court, realizing that such expansion, under the current decisions, would serve to remove from the taxing power of the federal government increasing sources of income, indicates that to a great extent a consideration of this increased activity of governmental agencies motivates it toward its decision refusing to adopt the doctrine of immunity from federal taxation of the salaries of state employees in the case then under con-

sideration. We submit that this reasoning is equally applicable in the instant case. With the steady expansion in the activities of the Federal Government this immunity from state taxation becomes increasingly serious, bringing within the sphere of immunity from taxation the salaries of an ever increasing number of employees of the various governmental agencies.

The following quotations from the majority opinion in this important and recent case indicate the ratio decidendi on this new test:

> "With the steady expansion of the activity of state governments into new fields they have undertaken the performance of functions not known to the states when the Constitution was adopted, and have taken over the management of business enterprises once conducted exclusively by private individuals subject to the national taxing power. In a complex economic society, tax burdens laid upon those who directly or indirectly have dealings with the states, tend, to some extent not capable of precise measurement, to be passed on economically and thus to burden the state government itself. But if every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction upon national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation. See South Carolina vs. United States, 199 U. S. 437, 454-455, 50 L. Ed. 261, 266, 267, 26 S. Ct. 110, 4 Ann. Cas. 737. Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive."
>
> "The challenged taxes * * * are upon the net income of respondents, derived from their employment in

common occupations not shown to be different in their methods or duties from those of similar employees in private industry. The taxpayers enjoy the benefits and protection of the laws of the United States. They are under a duty to support its government and are not beyond the reach of its taxing power. *A nondiscriminatory tax laid on their net income, in common with that of all other members of the community, could by no reasonable probability be considered to preclude the performance of the function which New York and New Jersey have undertaken, or to obstruct it more than like private enterprises are obstructed by our taxing system. Even though, to some unascertainable extent, the tax deprives the states of the advantage of paying less than the standard rate for the services which they engage, it does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as states.* At most it may be said to increase somewhat the cost of the state governments because, in an interdependent economic society, the taxation of income tends to raise (to some extent which economists are not able to measure, see Indian Motorcycle Co. vs. United States, supra, p. 581, footnote 1) the price of labor and materials. The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the national government, in order to secure the state a theoretical advantage so speculative in its character and measurement as to be unsubstantial. A tax immunity devised for protection of the states as governmental entities cannot be pressed so far." (Italics ours.)

This Court, above, adopted "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function." The second will be discussed in the next succeeding point of argument. The first "dependent upon the nature of the function being performed by the state or in its behalf, excludes from immunity activities thought not to be essential to the preservation of state governments" affords a new test of the term "essential governmental function," which should be applied to the instant case.

When this Honorable Court rejected the doctrine of immunity from the Federal Income Tax of salaries received by employees of the state, engaged in functions not known at the time our Constitution was adopted, when the burden upon the state function was conjectural, we submit that at the same time this court also rejected the doctrine as applied to the immunity from state taxation of salaries received by employees of the Federal Government, engaged in this expanding function of governmental activities into new fields not known at the time of the adoption of our Constitution, which enterprises were once exclusively conducted by private individuals, when the burden thereon is conjectural and not substantial. The imposition of the Utah Income Tax on the income of the respondent herein, in common with that of all Utah residents, could by no reasonable probability be considered to substantially preclude or burden the powers and duties of the R. F. C. or the R. A. C. C. We believe that the above decision furnishes legal justification and precedent upon which this Court may and should rely in reversing the decision which this brief questions.

With relation to this principle this Court said:

> "As was pointed out in Metcalf & Eddy vs. Mitchell, supra, 524, there may be state agencies of such a character and so intimately associated with the performance of an indispensable function of state government that any taxation of it would threaten such interference with the functions of the government itself as to be considered beyond the reach of the federal taxing power. If the tax considered in Collector vs. Day, supra, upon the salary of an officer engaged in the performance of an indispensable function of the state which cannot be delegated to private individuals, may be regarded as such an instance, that is not the case presented here."

It is submitted that the activities carried on by the respondent in this case as counsel for the Reconstruction Finance Corporation and the Regional Agricultural Credit

Corporation, which agencies are engaged in a field not known at the time our Constitution was adopted, are clearly of such a character that they should be classified with the activities of the employees of the New York Port Authority rather than with the activities involved in the case of Collector vs. Day, which were those of probate judge of a state court. We submit that this conclusion should be reached on the merits of the case, but maintain that the disposition of this Court, as it is expressed in the paragraph quoted immediately above, precludes any other result.

The ultimate fact to be determined under this interpretation is the nature of the operations of the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation. An examination of their articles of incorporation and their various activities discloses that they operate as commercial banks and in many instances perform functions which are ordinarily, and which before the establishment of these two corporations by the Federal Government, had been handled solely and exclusively by privately owned commercial banking enterprises or other privately owned financial corporations. We submit, therefore, that the operation of these two corporations is not the exercise of an essential governmental function known and contemplated at the time of the adoption of our Constitution, but is an operation by the Federal Government in the vastly increasing field of private governmental business and therefore proprietary in nature.

Further, Mr. Justice Black, in a special concurring opinion in the Gerhardt case, makes it quite clear that in his opinion, the entire test of whether or not the function of the employee is essential or non-essential should be disregarded. The following quotations from his opinion clearly indicate that this is his conclusion:

> "Testing taxability by judicial determination that State governmental functions are essential or non-essential, contributes much to the existing confusion.

I believe the present case affords occasion for appropriate and necessary abandonment of such a test, particularly since recent decisions have already substantially advanced toward a reexamination of the doctrine of intergovernmental immunity. (See Brushaber vs. Union Pacific R. R. Co., 240 U. S. 1; Peck & Co. vs. Lowe, 247 U. S. 165, 172; Eisner vs. Macomber, 252 U. S. 189; Evans vs. Gore, 253 U. S. 245.)

• • • "There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmetal functions of today have at some time in the past been non-governmental. The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts, but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.

"Surely, the Constitution contains no imperative mandate that public employees—or others—drawing equal salaries (income) should be divided into tax-paying and non-taxpaying groups. Ordinarily such a result is discrimination. Uniform taxation upon those equally able to bear their fair shares of the burdens of government is the objective of every just government."

Furthermore, the tax on the salary of the lawyer for the two agencies does not impede and burden the United States in performing any essential governmental functions. There is, in effect, no burden on the United States Government in one of its essential governmental functions, because the salary of the attorney is taxed. There is nothing to show that the United States will not be able to similarly obtain professional services of lawyers, for the same remuneration, because of this tax. Justice Roberts, in his dissenting opinion in the case of Brush vs. Commissioner of Internal Revenue, 300 U. S. 352, 81 L. Ed. 691, pointed out this argument when he said:

"The petitioners seek to show the reality of the supposed burden by the suggestion that if his salary and the compensation of others employed by the city

is subject to Federal Income Tax, the municipality will be compelled to pay higher salaries in order to obtain the services of such persons, and the consequent aggregate increase in outlay will entail a heavy financial load. We know, however, that professional services are offered in the industry and business field; and that while there is no hard and fast standard of compensation, and men bargain for their rewards, salaries do bear some relation to experience and ability. There is a market in which a professional man offers his services and municipalities are bidders in that market. We know, further, that those in private employment, holding positions comparable to that of the petitioner, pay a tax equal to that levied upon him. It is clear that any consideration of the petitioner's immunity for federal income tax would be altogether remote, impalpable, and unascertainable in influencing him to accept a position under the municipality rather than under a private employee.

"In reason and logic it is difficult to differentiate the present case from that of a private citizen who furnishes goods, performs work, or renders service to a state or municipality under a contract or an officer or employee of a corporation which does the same."

In a study made by the United States Department of Justice entitled "Taxation of Government Bondholders and Employees—The Immunity Rule and the Sixteenth Amendment," (1938) the study being made at the direction of the Honorable Homer Cummings, Attorney General of the United States of America, it is said:

"The trend in the judicial rules of tax immunity is such that, independently of the effect to be given the Sixteenth Amendment, it may well be urged that the government bondholder, officer and employee can claim no constitutional exemption from a nondiscriminatory income tax."

And again in the introduction of the same work it is written:

"The rules of intergovernmental tax immunity are not simple. They vary, moreover, from one period to

another. During the last term of the Supreme Court this process of change was greatly quickened. It is, therefore, not easy to analyze the doctrine of tax immunity. Conclusions cannot safely be drawn in terms of the decided cases alone. Their present authority must of necessity be measured against the trends in decisions, particularly those which have acquired momentum in recent years."

In the case of James vs. Dravo Contracting Company, 302 U. S. 134 this Honorable Court upheld a tax exacted by the State of West Virginia from a contracting corporation. The state tax provided that upon every person engaging or continuing within West Virginia in the business of contracting, the tax shall be equal to two per cent. of the gross income of the business. The respondent, the Dravo Contracting Company, entered into four contracts with the United States for the construction of locks and dams on various rivers within the state, and it was contended that the tax laid a direct burden upon the federal government. This Court there held that the tax was not laid upon the federal government, its property or officers; nor was it laid upon an instrumentality of the government or upon a contract of the government.

The Court, in deciding the case, made this comment:

"The contention ultimately rests upon the point that the tax increases the cost to the Government of the service rendered by the taxpayer. But this is not necessarily so. The contractor, taking into consideration the state of the competitive market for the service, may be willing to bear the tax and absorb it in his estimated profit rather than lose the contract. In the present case, it is stipulated that respondent's estimated costs of the respective works, and the bids based thereon, did not include, and there was not included in the contract price paid to respondent, any specified item to cover the gross receipts tax, although respondent knew of the West Virginia act imposing it, and respondent's estimates of cost did include 'compensation and liability insurance, construction bond and property taxes.'

"*But if it be assumed that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax.* With respect to that effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In Trinityfarm Constr. Co. vs. Grosjean, 291 U. S. 466, 78 L. Ed. 918, 54 S. Ct. 469, the taxpayer entered into a contract with the federal government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the government. The fact that the tax on the gross receipts of the contractor in the Alward case, 282 U. S. 509, 75 L. Ed. 496, 51 S. Ct. 273, 75 A.L.R. 9, supra, might have increased the cost to the government of the carriage of the mails did not impress the Court as militating against its validity.

"There is the further suggestion that if the present tax of two per cent. is upheld, the State may levy a tax of twenty per cent. or fifty per cent. or even more, and make it difficult or impossible for the government to obtain the service it needs. The argument ignores the power of Congress to protect the performance of the functions of the national government and to prevent interference therewith through any attempted state action. In Thomson vs. Union P. R. Co., 9 Wall. 579, 19 L. Ed. 792, supra, the Court pointedly referred to the authority of Congress to prevent such an interference through the use of the taxing power of the State. 'It cannot,' said the Court, 'be so used,

> indeed, as to defeat or hinder the operations of the national government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection'." See Alward vs. Johnson, 282 U. S. 509, 514, 75 L. Ed. 496, 499, 51 S. Ct. 273, 75 A.L.R. 9; also see Mason vs. Tax Commission, 302 U. S. 186, 82 L. Ed. page 154. (Italics ours.)

In view of the stand taken by this Court in James vs. Dravo Contracting Co., supra, holding that a state tax on income of governmental contractors does not lay an unconstitutional burden upon the federal government, it is submitted that the decision of this Court in the case of Guy T. Helvering vs. Philip L. Gerhardt et al, supra, is a proper interpretation of the law and that the present case is not distinguishable therefrom. The Gerhardt and the Dravo Contracting Co. cases are, therefore, authority for this Court to reexamine the subject matter involved and to decide that the total amount of salaries received by the respondent herein from the R. F. C. and the R. A. C. C. is taxable income under the Utah Income Tax Law on individuals, provided for in Section 80-14-2, Revised Statutes of Utah, 1933, as amended.

POINT III

There is no Established Federal Constitutional Privilege or Principle Preventing the Imposition of a State Income Tax upon Salaries Received from the R. F. C. and the R. A. C. C., Because the Imposition of Such a Tax Neither Precludes nor Threatens Unreasonably to Obstruct any Function Essential to the Continued Existence of the Federal Government, and Because the Burden on the Federal Government is so Speculative and Uncertain that, if the Immunity Were Allowed, it Would Restrict the State Taxing Power Without Affording any Corresponding Tangible Protection to the Federal Government.

The next and sole remaining question to be determined is whether the imposition of the Utah Individual Income Tax upon salaries received by employees of the R. F. C. or the R. A. C. C. is unconstitutional or in any way impedes the operations of the Federal Government. It is our opinion that the imposition of an income tax on such salaries does not measurably burden, nor threaten unreasonably to obstruct any function essential to the continued existence of the Federal Government. This, we contend, is the present trend of thought of the United States Supreme Court, as exemplified in the case of Guy T. Helvering vs. Gerhardt, decided May 23, 1938, supra.

To again quote from that opinion:

> "The fact that the expenses of the state government might be lessened if all those who deal with it were tax exempt was not thought to be an adequate basis for tax immunity in Metcalf & Eddy vs. Mitchell, supra, in Group No. 1 Oil Corp. vs. Bass, 283 U. S. 279, in Burnet vs. Jergins Trust, 288 U. S. 508; or in Helvering vs. Mountain Producers Corp., No. 699, decided March 7, 1938. When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural. Willcutts vs. Bunn, supra, 231. The extent to which salaries in business or professions whose standards of compensation are otherwise fixed by competetive conditions may be affected by the immunity of state employees from income tax is to a high degree conjectural.
>
> "The basis upon which constitutional tax immunity of a state has been supported is the protection which it affords to the continued existence of the state. To attain that end it is not ordinarily necessary to confer on the state a competitive advantage over private persons in carrying on the operations of its government. There is no such necessity here, and the resulting impairment of the federal power to tax argues against the advantage. The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to

> a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power."

It is evident that this portion of the decision embodying the second of "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function" "forbids recognition of the immunity when the burden on the state is so speculative and uncertain that if allowed it would restrict the federal taxing power without affording any corresponding tangible protection to the state government". This is the proposition chiefly relied upon in this point. This principle, therefore, as applied to officers and employees of the R. F. C. and the R. A. C. C., is that the tax thereof, imposed upon the individuals, places no actual tangible burden upon the Federal Government.

The onus of first proving such a burden falls upon the Federal Government, and then proving that the power to engage in the activities of the R. F. C. and R. A. C. C. springs directly from or is incidental to some expressed or delegated power, falls directly upon the taxpayer, who is the respondent herein. It is submitted that the respondent cannot tangibly show that the tax in question is passed on to the federal agencies and actually burdens their operations, or that the activities of these agencies spring directly from or are incidental to some such delegated power. In our opinion, the decision of the Gerhardt case deprives the officers and employees of the R. F. C. and the R. A. C. C. of immunity from state income taxation, since this Honorable Court indicated that "a nondiscriminatory tax laid on their net income • • • could by no reasonable probability be considered to preclude the performance of the function • • • undertaken • • • or to obstruct it more than like private enterprises are obstructed by our taxing system".

As has already been pointed out, the doctrine of immunity is a reciprocal one and has equal application to both state and federal instrumentalities. The Federal Government has never contended, so far as can be ascertained, that the doctrine is not a reciprocal one and affords only the same protection to federal agencies as it affords to state agencies. Ambrosini vs. United States, 187 U. S. 1, 23 S. Ct. 1; Pollock vs. Farmers' Loan & Trust Co., 157 U. S. 429, 15 S. Ct. 654. The question is now presented, therefore, when the doctrine has been limited in its application to state agencies by the Port Authority cases, is not its application to federal agencies correspondingly weakened? In other words, what is to prevent the various states from levying nondiscriminatory taxes upon the compensation of the officers and employees of various federal agencies which function throughout the nation, when the burden is speculative and uncertain, and the imposition thereof neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the Federal Government?

There are, of course, certain arguments to the contrary. While the doctrine of immunity was reciprocal in that it applies alike to both governments, nevertheless, the test of immunity may not be the same. The Federal Government is one of delegated powers, while the powers belonging to the states under the constitution are the reserved sovereign powers. Therefore, the Federal Government may constitutionally engage in any business provided it is within its delegated powers, and hence the test as to its functions is not whether they are being exercised as governmental powers, but whether they are being exercised as delegated powers. United States vs. Loghlan, 271 Federal 425; Clallam County vs. United States, 263 U. S. 341, 44 S. Ct. 121.

It is a further fact that this court has held in certain older cases that federal instrumentalities are immune from nondiscriminatory state taxes laid upon all banks oper-

ating in the state, from state taxes upon obligations of the United States, and from a tax upon certain offices, including the captain of a revenue cutter. Osborn vs. Bank, 9 Wheat. 738. It seems clear, however, that these taxes were considered as direct impositions upon the agency itself and not upon individual taxpayers.

In the light of the decision in the Port Authority cases, none of these arguments appears to be available. It is now apparent that the test of immunity in the case of a nondiscriminatory tax laid upon individuals is whether or not the burden of the tax is passed on to the agency employing those individuals to such an extent that it actually impedes its proper functioning. There is no reason why that test is not of equal application to both state and federal agencies alike.

It is noteworthy that Justice Stone in his opinion raised the question as to how far the immunity of federal agencies rests on a different basis from that of state agencies, but expressly declined to pass upon it, stating that other considerations, not present there, may be controlling. What those considerations were he did not indicate, and it would be difficult to surmise. Certainly, however, in view of the meticulous care with which Justice Stone reviewed the whole doctrine, it can safely be assumed that those other considerations, whatever they are, would not be permitted to conflict with the two guiding principles so carefully developed there. Those principles strike far deeper than any considerations that can readily be surmised. They stem from the constitutional necessity itself, already adverted to. In short, the burden theory upon which the Port Authority cases were decided is of the essence of the immunity.

It is, therefore, submitted that the imposition of the state income tax on the salaries from the R. F. C. and the R. A. C. C. does not substantially nor materially burden the continued existence of the Federal Government. This is particularly true when the burden on the Federal Government,

as in the instant case, is so speculative and uncertain that it would afford no tangible protection to the Federal Government corresponding to the restriction upon the state taxing power.

CONCLUSION

It is respectfully submitted that, under the facts as disclosed by the record in this case and the established rules of law, a Writ of Certiorari issue to review the decree of the Supreme Court of the State of Utah, entered May 6, 1938, and that this Court find that the respondent's salaries as agency counsel for the R. F. C. and as counsel for the R. A. C. C. are both taxable income under the State Income Tax Law of the State of Utah. It is submitted that the Supreme Court of the State of Utah has decided a federal question in a way not in accord with the applicable decisions of this Honorable Court, by its holding that the R. F. C. and the R. A. C. C. were performing essential federal governmental functions, and that the salaries received for services rendered to them were not subject to state income taxation. A final determination of this federal question is of extreme importance to the subject of state income taxation and revenues therefrom in each of the forty-eight states. With the steady expansion and activity of the Federal Government into new fields, not known at the time our Constitution was adopted, the theory of immunity from state income taxation to each of the employees thereof would serve to remove from the taxing power of the several states increasing sources of revenue.

The Gerhardt case, supra, should afford ample authority for this Honorable Court to reexamine the entire field of subject matter on the question of immunity of federal employees from state taxation, to the end that this Court should find: first, that the salaries in question were not received in connection with the exercise of an essential federal governmental function, known and contemplated at the time our Constitution was adopted, and, therefore,

are not within the exemption of Subsection (2)(g) of Section 80-14-4, Revised Statutes of Utah, 1933; and, second, that there is no established federal constitutional privilege or principle preventing the imposition of a state income tax upon salaries received from the R. F. C. and the R. A. C. C., because the imposition of such a tax neither precludes nor threatens unreasonably to obstruct any function essential to the continued existence of the Federal Government, and because the burden on the Federal Government is so speculative and uncertain that, if the immunity were allowed, it would restrict the state taxing power without affording any corresponding tangible protection to the Federal Government.

Respectfully submitted,

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No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS

v.

W. Q. VAN COTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 491

THE STATE TAX COMMISSION OF UTAH ET AL., PETITIONERS

v.

W. Q. VAN COTT

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Utah (R. 47) is reported in 79 Pac. (2d) 6.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on May 6, 1938 (R. 63). A petition for rehearing was denied and the order entered on July 5, 1938 (R. 63). On October 3, 1938, Mr. Justice Butler granted an extension of sixty days in the time within which a petition for the writ of certiorari might be filed in this Court (R. 66). The pe-

tition for a writ of certiorari was filed on December 1, 1938. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTION PRESENTED

Whether the court below correctly construed the taxing laws of its State to except from taxation by their terms the salaries received by respondent as Agency Counsel for Reconstruction Finance Corporation and as counsel for Regional Agricultural Credit Corporation of Salt Lake City, Utah.

STATUTE INVOLVED

The applicable statutory provisions are set forth in the Appendix (*infra*, p. 13).

STATEMENT

In 1935 respondent was Agency Counsel for the Salt Lake City Agency of Reconstruction Finance Corporation (herein called "RFC") and counsel for Regional Agricultural Credit Corporation of Salt Lake City, Utah (herein called "RACC") (R. 6–7). Respondent filed an income tax return as required by the Utah statutes for that year, claiming exemption with respect to salaries received from these governmental instrumentalities (R. 1–1a). Upon receipt of notice from the State Tax Commission of Utah that it proposed to adjust respondent's income tax liability to include such salaries, respondent filed with it a petition for redetermination of the tax (R. 5). This petition

was denied (R. 44). On certiorari to the Supreme Court of Utah, the order of the State Tax Commission of Utah was reversed and the exemption of respondent's salaries from taxation by the State of Utah sustained (R. 47–63).

ARGUMENT

The ground on which petitioners seek the writ of certiorari in this case, as set forth in their petition, is that the court below has decided a federal question in a way not in accord with the applicable decisions of this Court. A further ground assigned, not in the petition itself but in petitioners' brief, is that the decision conflicts with a decision of the Supreme Court of Montana. Respondent contends, on the contrary, that not only is there no conflict with previous decisions of this Court or with the decision of the Supreme Court of Montana, but that no federal question is presented because the decision below rests upon a non-federal ground adequate to support it.

I

THE QUESTION INVOLVED IN THIS CASE

The instant case does not raise the basic question which petitioner asserts, for respondent's exemption from taxation was sustained by the court below under the terms of the State statutes themselves.

A State legislature may grant exemptions from its taxing laws far beyond and wholly without

reference to any immunity under the Constitution and laws of the United States. *The statutes of the State of Utah confer a broad exemption from taxation in this case,* even if it were true, as petitioners allege, that the Constitution and laws of the United States do not.

Subsection (2) (g) of Section 80–14–4 of the Revised Statutes of Utah, 1933, as amended, exempts from taxation

> Amounts received as compensation, salaries or wages from the United States or any posession [sic] thereof for services rendered in connection with the exercise of an essential governmental function.

It is not denied by petitioners that the salaries here involved were received "from the United States." The only question is whether the services here involved were "rendered in connection with the exercise of an essential governmental function" within the meaning of that provision, and this question was answered affirmatively by the court below. As that court said:

> Our statute having made exempt salaries, wages, and compensation received "from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function", we must decide this case *under our statute* in the light of the meaning of its terms as construed by the Supreme Court of the United States. [Italics added.] (R. 62.)

If comparable exemptions had been present in the State statutes involved in *James* v. *Dravo Contracting Company,* 302 U. S. 134, and *Silas Mason Co.* v. *Tax Commission,* 302 U. S. 186, those cases would in all probability have had to be decided differently as a matter of State law. With such a statutory exemption present, the distinction in *Helvering* v. *Gerhardt,* 304 U. S. 405, between taxation of a governmental instrumentality and taxation of the compensation received therefrom would not have been controlling.

Thus, it is clear that the fundamental and important questions of inter-governmental immunity, such as were considered and decided by this Court in *Helvering* v. *Gerhardt, supra; Helvering* v. *Therrell,* 303 U. S. 218, and similar cases, are not present here.

II

NO QUESTION OF FEDERAL LAW IS PRESENTED BECAUSE THE DECISION BELOW RESTS UPON AN ADEQUATE NON-FEDERAL GROUND

If the court below had held that respondent was not engaged in "the exercise of an essential governmental function," and that his compensation was taxable by the State of Utah, a federal question would necessarily have been presented. The question would have been the constitutionality of a State statute purporting to tax compensation received from the United States. But since the State statute was construed by the court below to ex-

empt this compensation, the case was disposed of without reference to any question of immunity under the United States Constitution, for there is no doubt as to the right of a State court to decide the *meaning* of the statutes of its own State. The decision below was, therefore, based on an adequate non-federal ground which this Court will not review. *State Automobile Insurance Association* v. *Glick*, 294 U. S. 697; *Moran* v. *Horsky*, 178 U. S. 205, 215. See also *Neblett et al.* v. *Carpenter*, No. 21, Oct. Term, 1938.

What constitutes "an essential governmental function" within the meaning of the State statutes can not be a federal question, since this Court does not recognize a distinction between essential and nonessential governmental functions *of the United States*. Such a distinction is borrowed from the decisions of this Court regarding the functions *of the States* (although even there the distinction of governmental and proprietary functions is more common) and is not applicable to the United States. *McCulloch* v. *Maryland*, 4 Wheat. 316; *Van Brocklin* v. *Tennessee*, 117 U. S. 151. Only recently this Court said in the *Therrell* case, *supra*, at page 223:

> Among the inferences which derive necessarily from the Constitution are these: No State may tax appropriate means which the United States may employ for exercising their delegated powers; the United States

> may not tax instrumentalities which a State may employ in the discharge of her essential governmental duties—that is those duties which the framers intended each member of the Union would assume in order adequately to function under the form of government guaranteed by the Constitution.

It follows that the present inquiry must be as to the meaning of a State statute.

That the court below considered and analyzed decisions of this Court in its interpretation of the Utah statute makes the question none the less an interpretation of the State statute. Cf. *Levy* v. *Superior Court*, 167 U. S. 175, 177. The line drawn by the Utah statute does not, as we have seen, *supra*, pp. 5 and 6, coincide with or depend upon the extent of federal immunity under the Constitution and laws of the United States. There being no Utah decision on the question, the court below looked to these decisions and to the decisions of other State courts for guidance.

III

THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THIS COURT

Assuming without conceding that the question of "an essential governmental function" within the meaning of the Utah statutes could be deemed a federal question, it is submitted that it is insubstantial and that the decision below is in strict accord with the applicable decisions of this Court.

The RFC and the RACCs were created and have been administered in the exercise of traditional and essential governmental functions, recognized at least since *McCulloch* v. *Maryland, supra.* RFC was created by Congress to give temporary financial aid to distressed financial, agricultural, and commercial institutions, and to railroads, in an effort to stabilize financial conditions, to strengthen the national credit and currency system, and to assist fiscal institutions, including those created by Congress. Its entire capital is supplied by the United States, which alone may subscribe to its capital stock; its management is vested in a board of directors appointed by the President by and with the advice and consent of the Senate, and its remaining funds, when not supplied directly by the United States Treasury, are obtained by the issuance of obligations fully guaranteed as to principal and interest by the United States. See *Baltimore National Bank* v. *State Tax Commission of Maryland,* 297 U. S. 209, 211.

The RACCs were created by the issuance of charters directly to them by RFC pursuant to Section 201 (e) of the Emergency Relief and Construction Act of 1932. These corporations were created to make loans and advances to farmers and stockmen, the proceeds of which were to be used for agricultural purposes. Originally the entire capital stock of these corporations was held in the name of RFC, and the boards of directors were appointed

by RFC. Thereafter, pursuant to subsequent legislative authority, the capital stock of these corporations was transferred to the Secretary of the Treasury, and the management transferred to the Farm Credit Administration. Designed as they were to give emergency relief in an agricultural crisis, their functions can be no less important than those of the federal land banks which deal with related phases of the same problem. With respect to the federal land banks this Court has said that they were "engaged in the performance of an important governmental function." *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 231. See also, *Federal Land Bank* v. *Gaines*, 290 U. S. 247, 250, 254.

Ever since *McCulloch* v. *Maryland*, *supra*, it has been recognized that the government of the United States, which can exercise only its delegated powers, engages only in "governmental" functions. Since the constitutionality of the federal statutes here involved is not challenged, it follows that the federal functions here involved can not be classed otherwise than governmental, *Van Brocklin* v. *Tennessee*, *supra*; *Helvering* v. *Therrell*, *supra*; *Helvering* v. *Gerhardt*, *supra*, and there can, of course, be no difference in degree as to the essentiality of these functions undertaken under delegated powers.

Even if this case had presented the basic questions of intergovernmental immunity, as asserted by petitioners, the decision below still does not de-

part from applicable decisions of this Court. It is in strict accord with *Rogers* v. *Graves*, 299 U. S. 401, which dealt with the immunity of the General Counsel of the Panama Railroad Company from taxation by the State of New York.

The cases relied on by petitioners to establish a departure are irrelevant. Such decisions as *Helvering* v. *Gerhardt*, *supra*, *Helvering* v. *Therrell*, *supra*, and *Allen* v. *Regents*, 304 U. S. 439, dealt with State functions, and, as was pointed out above, the difference between State functions and functions of the United States is well established. Such decisions as *James* v. *Dravo Contracting Company*, *supra*, expressly stated that their facts required a different result from that reached in cases involving a State tax upon an employee of the United States or its instrumentalities.

IV

THE DECISION BELOW DOES NOT CONFLICT WITH A DECISION OF THE SUPREME COURT OF MONTANA

It is submitted that the decision below does not conflict with the decision of the Supreme Court of Montana in *Pomeroy* v. *State Board of Equalization*, 99 Mont. 534, 45 Pac. (2d) 316.

As has been demonstrated, the decision below rests upon an adequate non-federal ground. Accordingly, the decision of the Montana Supreme Court can in no way conflict with the decision of

the Utah Court finding such immunity *in the terms of the Utah statute.*

Even if the question of an "essential governmental function" within the meaning of the Utah statutes were considered to be a federal question, it is based on the provisions of a State statute differing materially from that involved in the *Pomeroy* case. In Montana, "salaries, wages, and other compensations received from the United States of officials or employees thereof * * *," Sec. 7, ch. 181, Laws of 1933,[1] are exempt from the State's income tax. Since one who is not an employee of the United States, and not immune under the Constitution and laws of the United States, could nevertheless receive compensation for the performance of an essential governmental function, the decision of the Supreme Court of Montana might well have been otherwise under a broad exemption statute such as was construed by the court below.

Moreover, it is decisive, as was pointed out by the court below, that the *Pomeroy* case was decided prior to the decision of this Court in *Rogers* v. *Graves, supra,* and would doubtless have resulted differently if it had been decided thereafter.

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[1] Although the statutory provision actually reads "from the United States *or* officials or employees thereof * * *," this was held by the court in the *Pomeroy* case to be a typographical error.

CONCLUSION

It is submitted that not only is there no conflict with previous decisions of this Court or with the decision of the Supreme Court of Montana, but that no federal question whatsoever is presented in this case because the decision below rests upon a non-federal ground adequate to support it. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

W. Q. VAN COTT,
Pro se.

APPENDIX

REVISED STATUTES OF UTAH

80–14–4. GROSS INCOME.

Defined.

(1) "Gross income" includes gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

Exclusions from Gross Income.

(2) The following items shall not be included in gross income and shall be exempt from taxation under this chapter: * * *

Tax-Free Salaries.

(g) Amounts received as compensation, salaries or wages from the United States or any posession [sic] thereof for services rendered in connection with the exercise of an essential governmental function.

U. S. GOVERNMENT PRINTING OFFICE 1939

No. 491

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OCTOBER TERM, 1938

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS

v.

W. Q. VAN COTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

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In view of the fact that the Supreme Court of Utah construed the exemption statute to exempt the salary here in question, that court never reached and never could reach the question of whether the statute if construed in some other way would offend the federal Constitution.

If the Supreme Court of Utah had construed the statute in such a way that it did not grant exemption for the salaries in question, the court would then have reached the federal question as to whether the statute thus construed offended the federal Constitution. This would have been the decision of a federal question. Cf. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109.

It is noteworthy that in *Brush* v. *Commissioner*, 300 U. S. 352, the salary involved was held exempt from federal taxation under a federal regulation almost identical to the statute involved in this case although in the absence of such a provision a contrary result might have been reached. See *Helvering* v. *Gerhardt*, 304 U. S. 405. So, under the statute involved in this case, respondent's salary is exempt from taxation regardless of what would be the case in the absence of such a State statute. If in any respect the court below might be said to have gone further than this Court has gone or would be willing to go, the question would still not be a subject for review here. For example, if comparable exemptions had been present in the State statutes involved in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, and *Silas Mason Co.* v. *Tax Commission*,

supra, those cases might well have been decided in favor of the taxpayer as a matter of State law.

4. It must further be noted that what constitutes an "essential governmental function" within the meaning of the State statutes cannot be a federal question since this Court does not recognize a distinction between essential and nonessential governmental functions *of the United States*. Such a distinction is borrowed from the decisions of this Court regarding the functions *of the States* (although even there the distinction of governmental and proprietary functions is more common) and is not applicable to the United States. This was stressed as early as *McCulloch* v. *Maryland*, 4 Wheat. 316, and reiterated many times. See *Van Brocklin* v. *Tennessee*, 117 U. S. 151; *Helvering* v. *Therrell*, 303 U. S. 218; *Helvering* v. *Gerhardt*, *supra*. It should be necessary merely to call the attention of this Court to the First Bank of the United States created in the exercise of sovereign powers delegated to the federal government and to contrast it with banks created and owned by the States in the exercise of their reserved proprietary powers. See *Osborn* v. *Bank of U. S.*, 9 Wheat. 738, 860, and *Briscoe* v. *Bank of Kentucky*, 11 Pet. 257.

We can perceive no indication that the analysis of the functions of the Panama Railroad Company in the *Rogers* case shows any intention to depart from the distinction between State activities

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In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 491

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS

v.

W. Q. VAN COTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of Utah (R. 47) is reported in 79 Pac. (2d) 6.

JURISDICTION

The judgment of the Supreme Court of Utah was entered on May 6, 1938 (R. 63). A petition for rehearing was denied and the order entered on July 5, 1938 (R. 63). On October 3, 1938, Mr. Justice Butler granted an extension of sixty days

in the time within which a petition for the writ of certiorari might be filed in this Court (R. 66). The petition for a writ of certiorari was filed on December 1, 1938, and was granted on January 3, 1939. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the decision of the court below rests upon an adequate non-federal ground in that it construed the taxing laws of its State to omit as a subject of taxation the salaries received by respondent as Agency Counsel for Reconstruction Finance Corporation and as counsel for Regional Agricultural Credit Corporation of Salt Lake City, Utah.

2. Whether the salaries so received by respondent are omitted as a subject of taxation from the taxing laws of the State of Utah.

3. Whether the salaries so received by respondent are immune from taxation by the States.

STATUTES INVOLVED

The applicable statutory provisions are set forth in part in the Appendix (*infra*, p. 66), and in part in a pamphlet of laws entitled "Reconstruction Finance Corporation Act as Amended, and Other Laws and Documents Pertaining to Reconstruction Finance Corporation, August 1938 (Revised)," which is filed with this brief.

STATEMENT

In 1935 respondent was Agency Counsel for the Salt Lake City Agency of Reconstruction Finance Corporation (herein called "Reconstruction") and counsel for Regional Agricultural Credit Corporation of Salt Lake City, Utah (herein called "Regional") (R. 6–7). In such capacities it was respondent's duty to perform the legal services required by Reconstruction and Regional in the areas served by the Salt Lake City Agency of Reconstruction and by Regional (R. 7). For such legal services rendered Reconstruction, respondent was paid a fixed monthly salary, and these services were performed under the direction, supervision, and control of the Board of Directors, the General Counsel, and the Solicitor of Reconstruction (R. 12). For such legal services rendered Regional, respondent was paid a designated amount per day, and these services were performed under the direction, supervision, and control of the General Counsel and General Solicitor of the Farm Credit Administration (R. 12). Such payments were made by checks drawn on the Treasurer of the United States by the Treasurer of Reconstruction and Regional, respectively (R. 7). A more detailed statement regarding Reconstruction, Regional, and their officers and employees is contained, *infra*, at pp. 25 to 40.

Respondent filed an income-tax return as required by the Utah statutes for that year, claiming

exemption with respect to salaries received from these governmental instrumentalities (R. 1–1a). Upon receipt of notice from the State Tax Commission of Utah that it proposed to adjust respondent's income tax liability to include such salaries, respondent filed with it a petition for redetermination of the tax (R. 5). This petition was denied (R. 44). On certiorari to the Supreme Court of Utah, the order of the State Tax Commission of Utah was reversed and the exemption of respondent's salaries from taxation by the State of Utah sustained (R. 47–63).

ARGUMENT

I. THE DECISION OF THE COURT BELOW WAS BASED SQUARELY UPON THE CONSTRUCTION OF THE UTAH TAXING STATUTE WHICH WAS HELD TO OMIT RESPONDENT'S SALARIES AS A SUBJECT OF TAXATION, AND THEREFORE THAT DECISION DID NOT AND COULD NOT REACH THE FEDERAL QUESTION AND SHOULD NOT BE REVIEWED

1. As stated by the court below—

> The question for determination is whether or not the plaintiff's salary as agency counsel for the Salt Lake Agency of the Reconstruction Finance Corporation * * * and his salary as counsel for the Regional Agricultural Credit Corporation of Salt Lake City * * * are either of them or both taxable income for the purpose of the State income tax law (R. 47).

The Utah income tax law, in defining what constitutes gross income (Subsection (2) (g) of Section

80–14–4), lists certain exemptions including the following:

> (g) Amounts received as compensation, salaries, or wages from the United States or any posession [sic] thereof *for services rendered in connection with the exercise of an essential governmental function.* [Italics added.]

The court, in commenting upon this subsection, said:

> Under the last quoted section the taxpayer is entitled to exclude from his gross income, in order to arrive at the figure for his taxable net income, any salary from the United States for "services rendered in connection with the exercise of an essential governmental function" (R. 48).

While the court stated that the statute was a recognition of the immunity existing under the federal laws and Constitution and suggested the possibility of a reconsideration of the doctrine of *Rogers* v. *Graves,* 299 U. S. 401, it nevertheless said:

> Our statute having made exempt salaries, wages, and compensation received "from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function," we must decide this case *under our statute* in the light of the meaning of its terms as construed by the Supreme Court of the United States (R. 62). [Italics added.]

It will be seen, therefore, that the court below construed its own statute. In these circumstances the judgment will be deemed to rest on State grounds adequate to support it.

In *Supreme Lodge K. P.* v. *Meyer*, 265 U. S. 30, the Supreme Court of Nebraska considered whether certain action taken by a fraternal insurance order was taken by a representative form of government as required by a Nebraska statute and concluded that it was not. This Court said on review, on p. 32:

> Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the state legislation, as though such meaning had been specifically expressed therein.

So far as this Court is concerned then, with the construction placed upon sub-paragraph (g) by the Supreme Court of Utah, the section may be regarded as reading as follows:

> The amounts received as compensation, salaries or wages from the United States—for services rendered in connection with the exercise of an essential governmental function, including the functions of the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation.

2. Nor does it matter that federal laws or cases may be relevant to a determination of State ques-

tions. In the case of *Miller's Executors* v. *Swann*, 150 U. S. 132, it was said, at p. 136:

> The fact that the state statute and the mortgage refer to certain acts of Congress as prescribing the rule and measure of the rights granted by the State, does not make the determination of such rights a Federal question. A State may prescribe the procedure in the Federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of Congress, the rules of the Federal courts, and the practices of the Land Department, and yet the questions for decision would not be of a Federal character. The inquiry along Federal lines is only incidental to a determination of the local question of what the State has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a Federal origin.

And in the case of *Louisville and Nashville Railroad Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, it was said, at page 302:

> If the jurisdiction of the United States court does not depend entirely upon diversity of citizenship it is because the suit arises under the laws of the United States. Judicial Code, § 24. But when, as here, the founda-

> tion of the right claimed is a state law, the suit to assert it arises under the state law none the less that the state law has attached a condition that only alien legislation can fulfill. The state law is the sole determinant of the conditions supposed, and its reference elsewhere for their fulfilment is like the reference to a document that it adopts and makes part of itself. The suit is not maintained by virtue of the Act of Congress but by virtue of the Louisiana statute that allows itself to be satisfied by that Act. See *Interstate Street Railway* v. *Massachusetts*, 207 U. S. 79, 84.

The cases just referred to have been very recently recognized in *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495, 507, and the *Louisville and Nashville* case was cited as authority for dismissal in *Pierce, as Trustee* v. *Dahlgren*, 256 U. S. 682, 683.[1]

It is submitted that in the instant case the contention that there are adequate State grounds upon which the judgment below rests has even greater force than in the cases cited above. No reference to any federal statute was incorporated

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[1] The instant case differs from such cases as, for example, *Silas Mason Co.* v. *Tax Commission*, 302 U. S. 186, since there State statutes were construed merely as an incident to determining the extent of a grant to the United States and consequently the extent of federal jurisdiction over particular lands. Even in such instances the interpretation put upon State statutes by State courts is given great weight and will be accepted unless it does violence to federal rights. *Silas Mason Co.* v. *Tax Commission*, *supra*, at pages 206–207.

in the Utah law now under review. The State legislature merely exempted federal salaries paid for services rendered in connection with the exercise of an essential governmental function, and the court below decided that the functions here involved were such functions.

That the court below considered decisions of this Court in its interpretation of the Utah statutes makes the question none the less an interpretation of State statutes. Cf. *Levy* v. *Superior Court,* 167 U. S. 175, 177.

3. Whatever the holdings of this Court have been—however the decisions heretofore rendered may be applied to this case or their facts distinguished—it cannot be denied that a State has the *uncontrolled* right to exempt from the operation of its income tax laws any income that its legislators deem wise to exempt. As is doubtless known to this Court and as is demonstrated, *infra,* pages 49 to 60, numerous measures are now pending before Congress designed to confer upon the States power to tax federal salaries. If it be assumed that one such measure becomes effective and removes inhibitions under the federal Constitution or laws to taxation of federal salaries by the States, nevertheless it would in no way affect what the legislature of the State of Utah has expressly declared exempt nor what such legislature has said to be exempt as such language is construed by the highest court of Utah.

on the one hand and federal activities on the other. When we remember that the Panama Railroad Company was organized under the laws of the State of New York many years prior to the construction of the canal, that it was originally organized with private capital, that it was entirely owned by private individuals, and that its incorporation was not for any other purpose than to serve private commercial ends, the reason for the close scrutiny of its activities which the Court gave in the *Rogers* case is apparent. In these circumstances it is readily understood why the operation of the canal and all its related and incidental activities should have been brought under careful review by this Court. After scrutinizing all the activities of the federal government in connection with the canal the Court indicated that they were all essential to its operations, and must be regarded as an enterprise which could be correctly characterized as governmental. In this connection, we should like to call attention to the comments of this Court on the case of *Skinner & Eddy Corp.* v. *McCarl*, 275 U. S. 1, which appear in the opinion in the *Rogers* case at page 404:

> "For many years before the War, the Government had employed the Panama Railroad Company as its instrumentality in connection with the Canal." In a footnote following that statement, we pointed out that the stock in the railroad company was acquired in order that the railroad might be used in

> the manner most helpful to the government in constructing the canal, and cited public documents which sustained that view.

and later, at p. 406:

> That under these laws, the creation, management and operation of the canal are all governmental functions and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, does not admit of doubt.

There was no discussion here as to whether or not the functions performed by the railroad company or any of the correlated activities were essential. They were held to be governmental, i. e., exclusively functions of the United States relating to delegated powers, and that was sufficient.

If a function is a federal governmental function at all it must be regarded as an essential one, since, within the Constitution, Congress is the sole judge of what is essential to the operation of the federal government, and to the achievement of governmental ends at the time when legislation is enacted. In *Farmers' and Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, this Court had before it a question involving the construction of the provisions of the National Bank Act of June 3, 1864. The Court said, by Mr. Justice Swain, at page 33:

> The constitutionality of the Act of 1864 is not questioned. * * * The national

> banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. *Of the degree of the necessity which existed for creating them Congress is the sole judge.* [Italics added.]

See also *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 290; *Smith* v. *Kansas City Title and Trust Co.,* 255 U. S. 180; and *Easton* v. *Iowa,* 188 U. S. 220.

II. ASSUMING THAT THE PROPER INTERPRETATION OF THE PHRASE "ESSENTIAL GOVERNMENTAL FUNCTION" AS USED IN THE UTAH STATUTES CAN BE DEEMED A FEDERAL QUESTION, RESPONDENT'S SALARIES HERE INVOLVED ARE OMITTED AS SUBJECTS OF TAXATION FROM THE STATE TAXING LAWS

1. We have shown that the United States in the exercise of delegated powers can exercise only governmental functions, and it has been recognized since *McCulloch* v. *Maryland, supra,* that there can be no difference of degree as to the essentiality of the functions of the United States.

Moreover, we shall demonstrate, *infra,* pp. 25 to 40, that Reconstruction and Regional are engaged exclusively in exercising traditional and important functions of the United States, and if the phrase "essential governmental functions" is to be applied to any federal activities it is clear that Reconstruction and Regional are exercising such functions.

Accordingly on either basis respondent's salaries are omitted as subjects of taxation by the State taxing laws.

2. In addition we shall now turn briefly to a consideration of the word "essential" as it has been considered recently by this Court in connection with the activities of *State* governments. In *Brush* v. *Commissioner, supra,* this Court had before it the taxability of the salary of the chief engineer of the Bureau of Water Supply of the City of New York.

The Court referred to numerous phrases in considering the words "essential governmental function" there involved. It stated the answer to the problem before it to depend upon whether the water system of the city was created and was conducted "in the exercise of the city's governmental functions" (p. 360).

Later it was said, at p. 361:

> The phrase "governmental functions," as it here is used, has been qualified by this court in a variety of ways. Thus, in *South Carolina* v. *United States,* 199 U. S. 437, 461, it was suggested that the exemption of state agencies and instrumentalities from state taxation was limited to those which were of a *strictly* governmental character, and did not extend to those used by the state in carrying on an ordinary private business. In *Flint* v. *Stone Tracy Company,* 220 U. S. 107, 172, the immunity from taxation was related to the *essential* governmental functions of the state. In *Helvering* v. *Powers,*

293 U. S. 214, 225, we said that the state "cannot withdraw sources of revenue from the federal taxing power by engaging in businesses which constitute a departure from *usual* governmental functions and to which, by reason of their nature, the federal taxing power would normally extend."

Again, at p. 362:

> In *United States* v. *California*, 297 U. S. 175, 185, the suggested limit of the federal taxing power was in respect of activities in which the states have *traditionally* engaged.
>
> In the present case, upon the one side, stress is put upon the adjective "essential," as used in the *Flint* v. *Stone Tracy* case, while, on the other side, it is contended that this qualifying adjective must be put aside in favor of what is thought to be the greater reach of the word "usual," as employed in the *Powers* case. But these differences in phraseology, and the others just referred to, must not be too literally contradistinguished. In neither of the cases cited, was the adjective used as an exclusive or rigid delimitation. For present purposes, however, we shall inquire whether the activity here in question constitutes an essential governmental function within the proper meaning of that term; and in that view decide the case.

Later, at p. 365, this Court said:

> We are, of course, quite able to see that certain functions exercised by a city are clearly governmental—that is, lie upon the

> nearer side of the line—while others are not as clearly private or corporate in character, and lie upon the farther side.

Upon an analysis of this opinion, we must reach the conclusion that qualifying words prior to the phrase "governmental functions" are of little or no significance.

The analysis which this Court gave in the *Rogers* case to the varied activities in connection with the Panama Canal was, as we have seen, *supra*, pp. 11 to 13, not undertaken for the purpose of determining whether these functions were essentially governmental, but whether they were governmental at all; i. e., functions exclusively of the United States.

III. BASED ON THE DECISIONS OF THIS COURT IN DOBBINS V. COMMISSIONERS, 16 PET. 435, AND ROGERS V. GRAVES, 299 U. S. 401, RESPONDENT'S SALARIES HERE INVOLVED ARE IMMUNE FROM STATE TAXATION, IRRESPECTIVE OF THE STATE STATUTES

1. We have heretofore discussed at length the decision of this Court in *Rogers* v. *Graves, supra*. It is sufficient here to state that in that case this Court stressed how well established was the principle of immunity established nearly a hundred years ago in the case of *Dobbins* v. *Commissioners, supra*, and reaffirmed it.

Those employed by the federal government can be in no different position today than they were in 1842 or in 1937; nor can the effect of such a tax as is here involved be different today. Accordingly,

any contention that the tax does not in fact burden or interfere with the federal government—though proper in connection with a tax upon third persons, such as contractors, dealing with the government—either mistakes the issue in this case, or requires a drastic revision of the doctrine of the *Dobbins* and *Rogers* cases. Such a contention should be addressed to Congress where as we shall show, *infra*, a comprehensive program with respect to the termination of such immunities is now being considered. With Congress studying the problem, there can be no such cogent reasons as are customarily required to warrant this Court in over-turning decisions that have stood for so many years.

2. The instant case presents an even clearer case for immunity than did the *Rogers* and other cases.

The Panama Railroad Company, although originally a private enterprise, had been acquired by the United States government for the purpose of aiding in the construction and operation of the Panama Canal. Referring to certain private business transacted by the railroad company, the Court stated that no importance was attached to this function, and said in the *Rogers* case, at page 408:

> The primary purpose of the enterprise being legitimately governmental, its incidental use for private purposes affords no ground for objection.

This we have seen, *supra*, pp. 11 to 13 in more detail. But in the instant case there is no private aspect of

the business of either one of these corporations. As we shall see, *infra*, pp. 25 to 40, each was chartered by the federal government to perform federal functions believed by Congress to be necessary and has no private incidental purposes. Each was organized for a single purpose—to carry out a governmental policy. It was said by this Court that the creation, management, and operation of the canal are all governmental functions "and the laws well within the constitutional power of Congress to provide for the national defense and to regulate commerce under the commerce clause of the Constitution, do not admit of doubt" (p. 406). Can it be any more a matter of doubt that the organization of Reconstruction for the purpose of preventing a national financial collapse or the organization of Regional for the purpose of aiding agricultural enterprises are within the constitutional power of Congress?

The corporations here concerned are more closely related to the federal government than the corporation considered in the case of *Clallam County* v. *United States*, 263 U. S. 341, where real estate and other physical property belonging to the United States Spruce Production Corporation was held not to be subject to taxation.

In the instant case the corporations were not created under State law—a fact which the Court in the *Clallam* case, at p. 345, seems to have considered sufficiently important to give rise to a doubt

that immunities would have existed had it not been for other elements in the case, and the case now before this Court is far stronger than the case presented to it in the *Clallam* case. The incorporation of these corporations was completed by Congress—they were brought into being by federal and not by State law. They operate in the several States throughout the Union for the sole benefit of the people of the United States as a whole, and for corporations organized by them in order to reinforce the financial structure set up by the people, and to afford nation-wide relief to agricultural enterprises. See, *infra*, pp. 25 to 40.[2]

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[2] The judgment below cannot be successfully attacked on the basis of any distinction between officers and employees of the United States. Petitioners do not rely on such a distinction and it will be considered here only briefly. Furthermore, since such a distinction would protect from taxation those best able to pay, it is not believed that such a distinction would be made without compelling reasons.

To the contrary there appears to be no justification for such a distinction. Although an office was involved in the *Dobbins* case this Court stressed there the fact that the tax was not on the office but on the emoluments therefrom. The reasons assigned in the *Dobbins* case for immunity apply equally to the salaries of officers and employees, and it would seem to be immaterial that a salary is fixed by statute or even, as in the case of Reconstruction, pursuant to statute (see Sec. 4 of the Reconstruction Finance Corporation Act) since in *Rogers* v. *Graves*, *supra*, the salary that was declared immune was fixed without regard to any specific statutory authority. Likewise, although in *Helvering* v. *Gerhardt* the distinction between officers and employees was noted, the

IV. ON THE PRINCIPLES OF FEDERAL SUPREMACY LAID DOWN BY THIS COURT IN McCULLOCH *v.* MARYLAND, 4 WHEAT. 316, AND RELIED ON AS RECENTLY AS 1938 IN HELVERING *v.* GERHARDT, 304 U. S. 405, RESPONDENT'S SALARIES HERE INVOLVED ARE IMMUNE FROM STATE TAXATION, IRRESPECTIVE OF THE STATE STATUTES

Recognizing that the United States exercises delegated powers alone it was specifically suggested in *Helvering* v. *Gerhardt, supra,* that with respect to federal immunity from State taxation the proper inquiry should be, *first,* into the power of Congress to create the federal instrumentality in question, and, *second,* into the intent of Congress regarding State taxation with respect thereto.

The same approach is required by the holding of that case. It was based on the proposition that federal powers—there the taxing power—are supreme and that such sovereign powers may be restricted only where the continued existence of the

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reasons assigned for the taxability of the employee there involved are equally applicable to officers.

It would thus be virtually impossible to draw a line between officers and employees with any semblance of reason, and only confusion would arise from the attempt. In any event respondent's position is no less responsible than that of the cutter captain involved in the *Dobbins* case and has no less relation to federal offices than did the position of the general counsel of the Panama Railroad Co. in the *Rogers* case.

Moreover, as we shall see, *infra*, the currency the doctrine of immunity with which we are concerned has received transcends any distinction between officers and employees.

State requires it. So here the exercise by Congress of sovereign federal powers must be as free as Congress wishes it to be from interference by the States—by taxation or otherwise—except perhaps where the continued existence of the State may be threatened. In the greater readiness of Congress than of the States to waive an immunity, by reason of the representation of the people of the States in Congress, this Court found additional support for a broader federal immunity than the States may have.[3] As we shall see, *infra*, it appears likely that Congress will act.

It will not do to consider here factually whether the tax in question burdens or interferes with the United States. The question here is one of intent which we shall show, *infra*, is unmistakable.[4] An inquiry into burdens or interference is proper, with Congress silent, where the tax is imposed upon a

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[3] For instances of such waivers see, *infra*, p. 52 and notes 11, 17, and 19.

[4] That Congress may provide expressly or impliedly for immunity from State taxation with respect to the exercise of sovereign federal powers, when in its opinion such immunity is necessary or proper, has been recognized since early days. See, for example, *McCulloch* v. *Maryland*, *supra*; *Osborn* v. *Bank of U. S.*, *supra*, at p. 864; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, at pp. 589, 592; *Smith* v. *Kansas Title & Trust Co.*, *supra*, at pp. 212-213; *Miller* v. *Milwaukee*, 272 U. S. 713, 716. Indeed in *James* v. *Dravo Contracting Co.*, *supra*, this Court stated that Congress might declare even *private persons* having dealings with the government to be immune from State taxation.

private individual having dealings with the government, as in *James* v. *Dravo Contracting Co., supra,* but, as recognized in that case itself, has no application to a tax upon such salaries as are here involved—at least when Congressional intent is apparent—and should be addressed to Congress.

A. NO QUESTION AS TO THE CONSTITUTIONALITY OF RECONSTRUCTION OR REGIONAL IS PRESENTED IN THIS CASE

No question as to the power of Congress has been raised in this case, either in the proceedings below, or in the petition for certiorari; nor was the question considered by the Court below. It follows that that question is not before this Court. *Connecticut Railway & Lighting Co.* v. *Palmer,* No. 63, October Term, 1938; *General Talking Pictures Co.* v. *Western Electric Co.,* 304 U. S. 175, 177–9; *Warner Co.* v. *Pier Co.,* 278 U. S. 85, 91; *Zellerbach Co.* v. *Helvering,* 293 U. S. 172, 182; *Mechanics Co.* v. *Culhane,* 299 U. S. 51, 59. As this Court said in *Blair* v. *United States,* 250 U. S. 273, at page 279:

> Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

Moreover, there has been no opportunity or occasion for the preparation of an appropriate record

to serve as the basis of the consideration of such questions. See *Polk Co.* v. *Glover*, No. 29, October Term, 1938; *Borden's Farm Products Co., Inc.* v. *Baldwin*, 293 U. S. 194, 212–213; *Texas* v. *Interstate Commerce Commission*, 258 U. S. 158, 162–163; *Liverpool, New York, and Philadelphia Steamship Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39; *Act of August 24, 1937*, c. 754, 50 Stat. 751.

Accordingly we shall seek to demonstrate, *first*, that Reconstruction and Regional are arms and instrumentalities of the United States engaged exclusively in exercising functions of the United States, and, *second*, that it is the present intention of Congress that the salaries of officers and employees thereof be exempt from State taxation.[5]

[5] We have shown, *supra*, footnote 2, that no distinction can properly be made between officers and employees of the United States for purposes of the instant case. Such a distinction does not even arise where the intent of Congress is concerned since the immunity here involved has firmly been believed and intended to extend to all persons employed by the federal government. See President's Message, bills, remarks, testimony, and Attorney General's opinion discussed on pp. 49 to 60 herein. Thus, too, any testimony regarding the amount of additional taxes the States will collect upon waiver of existing federal immunities has related to *all* persons employed by the federal government. See, for example, testimony of Honorable John W. Hanes, Under Secretary of the Treasury, before the House Committee on Ways and Means, 76th Cong., 1st Sess., January 26, 1939, p. 5.

B. RECONSTRUCTION AND REGIONAL ARE ARMS AND INSTRUMENTALITIES OF THE UNITED STATES ENGAGED EXCLUSIVELY IN EXERCISING THE FUNCTIONS OF THE UNITED STATES

We submit that Reconstruction and Regional are arms and instrumentalities of the United States to the same extent as any department of the government and that their activities are activities of the United States.

The right of Congress to create corporations for the purpose of carrying out its functions has been recognized since *McCulloch* v. *Maryland, supra,* and the use of the corporate form to provide flexibility of operations and administrative convenience in such matters as annual appropriations, preaudits, etc., has frequently been resorted to. *Skinner & Eddy Corp.* v. *McCarl, supra; Reed, Government-Controlled Business Corporations,* 10 Tulane Law Rev., 78, 84–86. Such administrative considerations do not affect the nature of the federal functions involved, or the considerations that enter into their immunity from State taxation. *Rogers* v. *Graves, supra; Clallam County* v. *United States, supra; McCulloch* v. *Maryland, supra.*

The distinction between corporations engaged exclusively in carrying out the functions of the United States and those serving the purposes of profit for individuals as well as the purposes of the United States was pointed out in *Clallam County* v. *United States, supra.* The corporations involved

in the instant case serve no private purposes whatsoever, and as we have demonstrated, *supra*, there is no difference as to essentiality or degree in the functions of the United States.[6]

In *Baltimore National Bank* v. *State Tax Commission*, 297 U. S. 209, this Court recognized that the functions of Reconstruction are exclusively those of the United States. The Court considered it unnecessary in that case to pass upon the constitutionality of Reconstruction but stated, at page 211, that—

> The purpose that [Reconstruction] has aimed to serve is not profit to the government, though profit may at times result from one or more of its activities. The purpose to be served is the rehabilitation of finance and industry and commerce, threatened with prostration as a result of the great depression.

That Reconstruction and Regional are arms and instrumentalities of the United States as directly as any department of the government and that they are engaged exclusively in exercising the functions of the United States will be apparent from a detailed statement of their powers, duties, and operations.

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[6] Indeed, unlike the Panama Railroad Co. involved in the *Rogers* case, the corporations here involved do not even have incidental purposes unrelated to the functions of the United States.

Reconstruction was created by Act of Congress on January 22, 1932. The Act, known as the Reconstruction Finance Corporation Act, made detailed provision for the administration of Reconstruction. Its capital of $500,000,000 was supplied by the United States, which alone was authorized to hold its stock (Sec. 2[7]). Its obligations may be issued only with the approval of the Secretary of the Treasury and are fully and unconditionally guaranteed by the United States (Sec. 9). The Secretary of the Treasury is authorized to market such obligations, using therefor all his facilities for the marketing of United States obligations, and all redemptions, purchases, and sales of such obligations by the Secretary are to be treated as public debt transactions (Sec. 9). It is authorized to deposit its monies with the Treasurer of the United States and in turn is authorized to act as depository of public monies and as financial agent of the United States (Secs. 7 and 12). Its management was originally vested in a Board of Directors consisting of the Secretary of the Treasury and six other Directors appointed by the President by and with the consent of the Senate; this Board has recently been changed to consist of five members so appointed (Sec. 3). It is given the franking privilege (Sec. 4). Administrative expenses are in-

[7] When no Act of Congress is mentioned the Reconstruction Finance Corporation Act, as amended, is referred to.

curred by it subject to the annual appropriation Acts of Congress (See, e. g., First Deficiency Appropriation Act, Fiscal Year 1936). It has succession for ten years (Sec. 4). Provision is made for liquidation by it during that time and thereafter by the Secretary of the Treasury (Sec. 13). Any surplus remaining upon liquidation is to be carried into the miscellaneous receipts of the Treasury of the United States (Sec. 13). Reconstruction is required to make quarterly reports of its operations to Congress (Sec. 15). As was stated by Mr. Beedy, a member of a House Banking and Currency Committee that considered the Reconstruction Finance Corporation Act prior to its passage:

> All of the powers, duties, and responsibilities with respect to the administration, execution, and enforcement of the Reconstruction Finance Corporation act will be vested in the board of directors of that corporation. They are the sole representatives of the Government, and the powers, duties, and responsibilities conferred under this act are conferred upon them alone. Cong. Rec., Vol. 75, Part 2, 72d Cong., 1st Sess., p. 1916.

No more than three of the five Directors of Reconstruction may be members of the same political party and not more than one shall be from any one Federal Reserve District (Sec. 3). The officers and employees of Reconstruction take the oath of

office prescribed by U. S. Rev. Stat., Sec. 1757, and their salaries are paid by check drawn on the Treasurer of the United States. On February 8, 1932, the United States Employees' Compensation Commission ruled that all employees of Reconstruction are "civil employees of the United States" within the meaning of the Federal Compensation Act of September 7, 1916, as amended. Employees of Reconstruction are subject to the standardized Government Travel Regulations approved by the President and use transportation requests subject to the approval of the Comptroller General of the United States (see Independent Offices Appropriation Act, 1938). Prior to the adoption of Public Resolution No. 3, 74th Congress, approved February 13, 1935, the salaries of officers and employees of Reconstruction were subject to the reductions from basic pay provided by the federal economy laws. Employees of Reconstruction are subject to annual and sick leave regulations set forth in Executive Orders Nos. 7845 and 7846, issued by the President on March 21, 1938, which provide detailed regulations with respect thereto for the executive branch of the Government.*

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* It is apparent that Congress believed and intended employees of Reconstruction to be employees of the United States. In Sec. 4 of the Reconstruction Finance Corporation Act, as amended, provision was made for Reconstruction:

> to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall

The purposes of Reconstruction are clearly revealed in its legislative history and in the terms of the Acts relating thereto. In the words of the title of the original Act it was "An Act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and for other purposes." Congressional debate on that Act prior to its passage revealed clearly the current economic problems with which the United States, through Reconstruction, intended to assist. Thus, Senator Walcott, the manager of the Reconstruction Finance Corporation Act on the floor of the Senate prior to its passage, said:

> In view of the unprecedented condition of the financial institutions of the United States, which is partly the cause and partly the effect of the present great world-wide economic collapse—the most severe and far-reaching in history—heroic relief measures

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be necessary for the transaction of the business of the corporation, without regard to the *provisions of other laws* applicable to the employment and compensation of officers or employees of the United States • • •. [Italics added.]

Likewise, Sec. 3 of said Act, which permits the appointment and compensation as an employee of Reconstruction of persons elsewhere employed in the executive branch of the government, was adopted to avoid the prohibitions of 5 U. S. C., Secs. 58 and 62, which forbid any person to hold more than one position within the government. See 75 Cong. Rec., p. 1952; *U. S.* v. *Morse*, 292 Fed. 272.

are needed. Our financial institutions are the mainsprings of our industrial well-being. All enterprises of any sort must look to them for the funds with which to operate, and whenever they fail to function normally industrial activity is inevitably paralyzed.

We are now facing a great emergency in consequence of drastic curtailment of the normal functioning of our banks. On the one hand we have those whose assets, with abnormally shrinking markets, have become frozen, and which, in order to preserve any degree of solvency, must stop doing business; on the other those with adequate cash reserves which, watching these shrinkages, are in terror of impairing their assets, and voluntarily remain in a state of abnormal liquidity. In the cases of both, the business of financing is brought to a standstill, and with it the wheels of activity of every sort stop turning.

The leading financial minds of the country have been puzzling for many months to find a solution for this situation. Many consultations have been held. Many congressional hearings, with many of the leading bankers and businessmen as witnesses, have been carried on with the object of accumulating and acting upon the more constructive ideas available for remedial legislation. Many of the ideas brought forth by these hearings are covered by Senate bill 1, "A bill to provide emergency financing facilities for banks and

other financial institutions, and, other purposes," which I am presenting to the Senate for consideration as reported out of the Committee on Banking and Currency. Cong. Rec., Vol. 75, Part 2, 72d Cong., 1st Sess., p. 1418.*

The situation which Reconstruction was designed to meet is analogous to that described by Mr. Justice Brandeis in *United States* v. *Guaranty Trust Co.*, 280 U. S. 478, at p. 484:

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*The intimate link between such institutions as Reconstruction and the fiscal powers of Congress becomes ever more apparent, when we consider the extent to which currency has been supplanted by credit instruments as a medium of exchange, and the inability of Congress successfully to exercise its powers to tax and to borrow in a paralyzed financial community. See Hearings before the House Banking and Currency Committee on H. R. 5357, 74th Cong., 1st Sess., p. 213; Report of the Comptroller of Currency in 1919, Vol. 2, p. 36. Thus it is significant, to cite only a single factor, that between December 31, 1928, and December 30, 1933, the total number of banks in the country decreased from 25,576, to 15,011, and the total amount of deposits decreased from $56,706,000,000 to $38,505,000,000. See 23rd Annual Report of the Board of Governors of the Federal Reserve System, 1936. As of June 30, 1938, the total number of banks has been increased to 15,287 and the total number of deposits increased to $52,194,913,000. In addressing itself to this distressed financial situation and in taking measures to protect and preserve financial agencies previously created by Congress, Reconstruction is exercising traditional and paramount functions of the United States. *Westfall* v. *United States*, 274 U. S. 256; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416; *Farmers' and Mechanics' National Bank* v. *Dearing*, *supra*; *McCulloch* v. *Maryland*, *supra*.

> These appropriations were made in order to meet a pressing need. At the time of the passage of Transportation Act 1920, most of the railroads of the United States lacked funds for necessary improvements, equipment, and expansion of facilities. Some of the carriers needed funds, also, to meet maturing obligations. The credit of many carriers was seriously impaired. There was a general reluctance among investors to purchase new railroad securities even of the strongest railroads. Congress deemed it important to preserve for the nation substantially the whole existing transportation system. Compare *New England Divisions Case* (*Akron, C. & Y. R. Co.* v. *United States*) 261 U. S. 184, 190, 67 L. ed. 605, 609, 43 Sup. Ct. Rep. 270. In order to accomplish this, it was thought necessary that the United States should, to a certain extent, finance the carriers until it would become possible to restore their credit, by increase of rates or otherwise. The provisions of title II. of Transportation Act 1920 were framed to that end. Through them, the financial aid which had been given during Federal control was to be extended for a further period.

Many different powers were conferred upon Reconstruction from time to time by Congress in an effort to approach a complex economic problem from many sides. The principal of these may conveniently be summarized as follows:

It was authorized to make loans to banks, insurance companies, mortgage loan companies, and other financial institutions, "to aid in financing agriculture, commerce, and industry, including facilitating the exportation of agricultural and other products" (Sec. 5). It was authorized to make loans upon the assets of closed banks, saving banks, or building and loan associations, and to purchase the assets of some of these to aid in an orderly liquidation, reorganization, or stabilization thereof (Secs. 5 and 5e). It was authorized, with the approval of the Interstate Commerce Commission, to make loans to railroads engaged in interstate commerce or to purchase or guarantee the obligations thereof, "to aid in the financing, reorganization, consolidation, maintenance, or construction thereof" (Sec. 5). It was authorized to make loans to "any business enterprise when capital or credit at prevailing rates for the character of loan applied for is not otherwise available" "for the purpose of maintaining and promoting the economic stability of the country or encouraging the employment of labor" (Sec. 5d). It was authorized to make loans to States for "relief of destitution" (Sec. 1 of Emergency Relief and Construction Act of 1932), and to make loans to aid in the relief of disasters caused by floods, tornadoes, cyclones, earthquakes, or conflagrations (Sec. 201 (c) (6) of said Relief Act, as amended and supple-

mented). It was authorized to make loans to States, municipalities, and political subdivisions and other public agencies thereof "to aid in financing projects authorized under federal, State, or municipal law which are self-liquidating in character" (Sec. 201 (a) of said Relief Act, also Sec. 5d). It was authorized to make loans "in order that the surpluses of agricultural products may not have a depressing effect upon current prices of such products * * * for the purpose of financing sales of such surpluses in the markets of foreign countries * * *" (Sec. 201 (c) of said Relief Act), and to make loans "to finance the carrying and orderly marketing of agricultural commodities and livestock produced in the United States" (Sec. 201 (d) of said Relief Act). It was authorized to make loans to enable drainage, levee, and irrigation districts and similar public bodies, to reduce and refinance their outstanding indebtedness incurred in connection with projects "devoted chiefly to the improvement of lands for agricultural purposes" (Sec. 36 of the Emergency Farm Mortgage Act of 1933).

It was authorized to subscribe for the preferred stock, capital notes, and debentures of national banks and State banks and trust companies if in the opinion of the Secretary of the Treasury such institution was "in need of funds for capital purposes" and he "with the approval of the Presi-

dent" requested Reconstruction to make such purchase (Sec. 304 of an Act approved March 9, 1933, as amended, c. 1, 48 Stat., 6). It was authorized to subscribe for preferred stock or capital notes of insurance companies under similar conditions (Act approved June 10, 1933, as amended, c. 55, 48 Stat., 119–122). It was authorized to subscribe for the stock of national mortgage associations or of mortgage loan companies, trust companies, savings and loan associations, and other similar financial institutions organized under the laws of the United States or of any State "to assist in the re-establishment of a normal mortgage market" (Sec. 5c).

In addition to these discretionary financial powers Reconstruction was directed by Acts of Congress to allocate and transfer various amounts to other branches of the government. In this respect it acts in a capacity similar to that of the Treasury of the United States. Thus, it was directed to make monies available to the Secretary of Agriculture (Sec. 2, and Act approved February 4, 1933), to the Governor of the Farm Credit Administration (Sec. 5 of Farm Credit Act of 1933), to the Secretary of the Treasury (Sec. 2), and to the Farm Loan Commissioner (Sec. 32 of the Emergency Farm Mortgage Act of 1933), and was authorized to supply the funds to enable the Secretary of the Treasury to subscribe for the capital stock of the Home Owners' Loan Corporation on behalf of the

United States (Sec. 4 of Home Owners' Loan Corporation Act of 1933). Reconstruction was also directed to make available a substantial portion of its unobligated funds if requested by the President, to be applied for relief purposes (Title 2, Emergency Appropriation Act, fiscal year 1935; Emergency Relief Appropriation Act of 1935).

Originally Reconstruction's lending powers were limited to one year (Sec. 5). They have been extended from time to time by Executive Order and Congressional action, the most recent extension—to June 30, 1939—being contained in an Act approved January 26, 1937 (c. 6, 50 Stat., p. 5). That Reconstruction's activities are limited to the needs and purpose of the United States is clearly demonstrated therein, since this last extension was conditioned in the following language:

> *Provided,* That in order to facilitate the withdrawal of the credit activities of the Corporation when from time to time during such period the President finds, upon a report of the Board of Directors of the Corporation or otherwise, that credit for any class of borrowers to which the Corporation is authorized to lend is sufficiently available from private sources to meet legitimate demands upon fair terms and rates, the President may authorize the directors to suspend the exercise by the Corporation of any such lending authority for such time or times as he may deem advisable.

In the exercise of these powers and duties Reconstruction's activities have been manifold. These are set forth, as of December 31, 1935, in the Record of this case, at pages 25 to 42, and need not be described here in detail. Suffice it to say that total disbursements authorized as of that time amounted to approximately $10,600,000,000 and total actual disbursements to approximately $8,200,000,000. As of that time, too, repayments of disbursements, excluding allocations to other branches of the Government directed by Acts of Congress, amounted to over 55% of the amounts so disbursed.

It is important to note that these activities have been carried on in strict accord with the needs and purposes of the United States. Thus, in acquiring the preferred stock of banks Reconstruction could not act as an investor or an entrepreneur, but only after the Secretary of the Treasury had found that funds were needed for capital purposes. Likewise the dividend rate on such preferred stock, as have the dividend and interest rates charged by Reconstruction generally, have from time to time been reduced by it in order that the funds it supplies might accomplish their purpose more effectively. (See testimony of Chairman of Reconstruction before House Committee on Banking and Currency on H. R. 11047, 74th Cong., 2nd Sess., p. 2.) Furthermore, pursuant to several statutory provisions, and as a matter of policy generally, Reconstruction's loans are limited to instances

where credit at prevailing rates for the character of the loan involved is not available from private sources (Sec. 5 and 5d; testimony of Chairman of Reconstruction before House Committee on Banking and Currency on H. R. 4240, 74th Cong., 1st Sess., p. 4).

Regional was created by the issuance of a charter directly to it by Reconstruction pursuant to Section 201 (e) of the Emergency Relief and Construction Act of 1932 (R. 23). It was created to make loans to farmers and stockmen, the proceeds of which were to be used for agricultural purposes. Its activities are set forth in detail in the Record herein at pages 15 and 20–22. Originally the entire capital stock of Regional was held in the name of Reconstruction and its Board of Directors was appointed by Reconstruction (R. 11). Thereafter, pursuant to subsequent legislative authority the capital stock of these corporations was transferred by Executive Order to the Secretary of the Treasury and the management transferred to the Farm Credit Administration. See Executive Order No. 6084, March 27, 1933; Executive Order No. 7848, March 22, 1938. Additional funds were obtainable by Regional by rediscounting eligible paper with Reconstruction, the Federal Reserve Banks, and the Federal Intermediate Credit Banks. With capital supplied exclusively from the United States and the management vested in the United States and its instrumentalities Regional was at first in

effect a division of Reconstruction and thereafter of the Farm Credit Administration. Other indications of the identity of Regional with the United States may be found in the brief of the government in *Keifer and Keifer* v. *Reconstruction Finance Corporation and Regional Agricultural Credit Corporation*, No. 364, October Term 1938.

From a review of the organization, the purposes, the powers, and the activities of Reconstruction and Regional, it would seem difficult to imagine a governmental instrumentality more intimately connected with the functions and activities of the United States, or more exclusively devoted thereto. The corporate form was adopted to provide administrative convenience for their manifold activities. But their purposes and activities could not have been more directly those of the United States.[10]

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[10] It is apparent that respondent's contention that Reconstruction and Regional are not exercising essential federal governmental functions known and contemplated at the time the federal Constitution was adopted, but are exercising ordinary business powers, is untenable. As there is no distinction between federal functions as long as they are devoted exclusively to the needs and purposes of the United States, this contention has no basis in principle.

Nor has it any basis in fact. In 1781 the Continental Congress created the Bank of North America and the United States acquired more than one-half of its capital stock. *Lewis, A History of the Bank of North America, 1882.* Then the Constitutional Convention considered a proposal to give Congress specific power to create a bank, *Farrand, The Records of the Federal Convention*, Vol. 2. p. 616, and

C. IT IS THE PRESENT INTENTION OF CONGRESS THAT THE SALARIES OF OFFICERS AND EMPLOYEES OF THE UNITED STATES AND ITS INSTRUMENTALITIES BE IMMUNE FROM TAXATION BY THE STATES

The immunity of the salaries of officers and employees of the United States and its instrumentalities from taxation by the States has been recognized for nearly a hundred years, having first been declared in *Dobbins* v. *Commissioners, supra,* and endorsed and reaffirmed two years ago in *Rogers* v. *Graves, supra.* In the light of such decisions, it is unreasonable to assume that if Congress had intended to permit the taxation of employees of the

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Vol. 3, p. 375, and soon after the adoption of the Constitution the First Bank of the United States was chartered to engage in a variety of lending functions including ordinary commercial loans to individuals, acquisition of real estate mortgages, and loans to State banks, *Holdsworth and Dewey, The First and Second Banks of the United States*, Sen. Doc. No. 571, 61st Cong., 2nd Sess., *passim*, and the balance sheets reprinted at pp. 308–311.

Moreover, Reconstruction and Regional, as we have seen, exercise their powers only in an emergency situation to protect an existing credit structure, to protect existing financial institutions, and only when private credit is not otherwise available. They, therefore, supplement and support rather than supplant existing facilities, and are guided by considerations that differ greatly from those that influence private business. And though we have shown a similarity to the form of private transactions to be superficial, even if such similarity were more substantial it would not affect the governmental nature of the operations. See, *Rogers* v. *Graves, supra; Clallam County* v. *U. S., supra; Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522.

United States and its instrumentalities it would not have said so in clear and unmistakable language.[11]

It certainly cannot be said that Congress has been proceeding in ignorance of the decisions of this Court, for the immunity has been called to its attention on many occasions, and it has, up to the present time, failed to act with respect thereto. At this moment a Senate committee, appointed pursuant to S. Res. 303, 75th Cong., 3rd Sess., is making a careful study of the entire problem as a result of the President's Message to Congress of April 25, 1938, in which he requested legislation *terminating* such tax exemptions, and is required to submit its recommendations by March 1, 1939. The House Committee on Ways and Means has just made a similar investigation into tax-exempt salaries, Hearings on Tax-Exempt Salaries, January 26, 1939, and on February 1, 1939 its Chairman, Congressman Doughton, introduced a comprehensive measure—H. R. 3590—which is one of a legion designed to *waive existing immunities*, on which prompt hearings are scheduled.

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[11] Even with respect to national banks, which serve the purposes of private profit, as well as those of the federal government, this Court has said that an affirmative consent by Congress is necessary before the States can tax either the banks or the shares of stock owned by private individuals therein. *Owensboro National Bank* v. *Owensboro*, 173 U. S. 664; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103. Congress did not leave its intention to permit such taxation to speculation, but expressed it affirmatively in unmistakable language in U. S. Rev. Stat., Sec. 5219.

It is obviously the unmistakable intention of Congress to study fully these questions prior to conferring such consent, and it, therefore, cannot be said to have been the intention of Congress to date that such salaries be subject to taxation.[12]

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[12] No guide to the intent of Congress may be found in the corporate organization of Reconstruction and Regional or in the form of their activities. As we have seen they are direct arms and instrumentalities of the United States and it is decisive that the corporate organization of such arms and instrumentalities, or the form of their activities, has never affected their immunity from State taxation. *Rogers* v. *Graves*, *supra*, *Clallam County* v. *U. S.*, *supra*, *McCulloch* v. *Maryland*, *supra*.

Nor may any guide to intent be found in Sec. 10 of the Reconstruction Finance Corporation Act. This provision declares Reconstruction, including its franchise, capital, reserves, surplus, income, and obligations, to be exempt from taxation and consents expressly to State taxation of realty. Such a provision appears to have first been used in 1913, in Sec. 7 of the Federal Reserve Act, and was perhaps important in connection with Federal Reserve Banks since they are owned by member banks. Since that time such provisions have been traditionally used in connection with corporate government instrumentalities, whether or not wholly owned and controlled by the United States, and have served the twofold purpose of consenting to State taxation of realty, and of restating immunities in certain respects to forestall possible attempts by the States to tax such aspects of the instrumentalities, as their franchise, capital, etc. But such provisions do not purport to cover by their terms the entire field of immunity. (See H. Rep. 1995, 74th Cong., 2nd Sess.; H. Rep. 2199, 74th Cong., 2nd Sess.; S. Rep. 1545, 74th Cong., 2nd Sess.) Nor are they necessary to assure immunity. (See cases cited earlier in this footnote.) Since that provision purports both to confer immunity and to consent to taxation, only conflicting inferences can be drawn

As we have said, the immunity of salaries of officers and employees of the United States and its instrumentalities was declared by this Court many years ago in *Dobbins* v. *Commissioners, supra,* and affirmed as recently as 1937 in *Rogers* v. *Graves, supra.* In determining Congressional intent we are not concerned with possible limitations upon the scope of that doctrine, which may be inherent in it [13] or be suggested by present-day conditions; we are concerned only with the currency it has received.

Such currency can readily be ascertained from a few references to recent decisions of this Court. Thus in *Rogers* v. *Graves, supra,* this Court stressed how well established was the rule of the *Dobbins* case and merely applied it to the salary of the General Counsel of the Panama Railroad Co., a corporate instrumentality of the United States, saying at pages 408–409:

> In *Dobbins* v. *Commissioners of Erie County,* 16 Pet. 435, 448–449, this court held that a

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where it is silent. Indeed, neither party is placing any reliance upon it.

Accordingly, that provision is too remote from the instant problem to be useful, while to the contrary Congress has given much consideration to the precise question involved in this case.

[13] For example, it was suggested *passim* in *Helvering* v. *Gerhardt, supra,* that the tax in *Dobbins* v. *Commissioners,* supra, was levied on an office. It should be noted, however, that this contention was made and expressly rejected in the *Dobbins* case itself at page 445.

> state was without authority to tax the instruments, or compensation of persons, which the United States may use and employ as necessary and proper means to execute its sovereign power. The rule is well established; and the reasons upon which it is based and the authorities sustaining it have been so recently reviewed by this Court, *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575, *et seq.*, that further discussion is unnecessary.

Brief references to the *Dobbins* case may likewise be found in *Helvering* v. *Therrell, supra.; James* v. *Dravo Contracting Co., supra,* at p. 149; *Trinity-farm Co.* v. *Grosjean,* 291 U. S. 466, 471; *Indian Motocycle Co.* v. *U. S.,* 283 U. S. 570, 577; *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 389.

The doctrine has had equal currency in Congress and in the executive branch, as will be pointed out later; but even without such evidence the silence of Congress in the face of the doctrine of the *Dobbins* case would compel the conclusion that salaries such as are here involved were intended to be immune from State taxation.

The silence of Congress in the face of interpretations, whether executive or judicial, with respect to any of the powers of the federal government has long been recognized as a declaration of Congressional intent.[14] See, e.g., cases, *infra,* pp. 61

[14] Since, as recognized in the *Gerhardt* case, the question of federal immunity is one of Congressional intent, it is clear that the cases since *McCulloch* v. *Maryland, supra,* that have

to 64, for instances of executive interpretation. Just such a case of judicial interpretation was recently presented to this Court in *Gwin, White & Prince, Inc.*, v. *Henneford*, No. 75, October Term, 1938. It found an immunity, saying:

> For more than a century, since *Brown* v. *Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. *Webber* v. *Virginia*, 103 U. S. 344; *Telegraph Co.* v. *Texas*, 105 U. S. 460; *Robbins* v. *Shelby County Taxing District*, *supra*; *Leloup* v. *Mobile*, 127 U. S. 640; *Brennan* v. *Titusville*, 153 U. S. 289; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Fisher's Blend Station* v. *State Tax Commission*, *supra*; *Adams Manufacturing Co.* v. *Storen*, *supra*. For half a century, following the decision in *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326, it has not been doubted that state taxation of local partici-

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recognized federal immunity in the absence of a specific federal statute have implied an immunity with Congress silent, even in the absence of judicial or executive interpretations. In fact, regardless of what differences there may be in the scope of the immunity of interstate commerce from State interference and the immunity of the exercise of federal powers from State taxation, there is a close analogy between these two fields in that immunities have readily been implied in both by the courts and been waived by Congress. See footnote 19, *infra*, and *Whitfield* v. *Ohio*, 297 U. S. 431.

pation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed. During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established.

The immunity of salaries of officers and employees of the United States and its instrumentalities has been even more firmly entrenched than the immunity of interstate commerce from a gross receipts tax, since the former immunity has been clearly recognized by this Court, by Congress, and by the executive branch for many years, whereas the scope of the latter has many times been subject to doubt. *Willoughby, The Constitution of the United States* (2d ed.), pp. 1082–1085. Moreover, the silence of Congress in such a case as the instant one would be at least as significant as in the *Gwin, White* case since there the dispute was only between the State and wholly private taxpayers, with power in Congress to settle it in the interest of a free commerce, whereas here the controversy involves the exercise of sovereign powers by the federal government itself and a disputed interference therewith which for many years has been believed to be prohibited and which Congress has not seen fit to permit.[15]

[15] That the problem here involved is one of considerable governmental concern is shown, *infra*, by the detailed Congressional and executive consideration it has received.

Unlike the taxpayer involved in *James* v. *Dravo Contracting Company, supra,* who was an independent contractor with the government—a relationship that has for many years been recognized to confer no immunity from a non-discriminatory tax that does not interfere substantially with the Government [18]—we are here dealing with an employee of a government instrumentality whose immunity has been recognized for an even longer period of time. Accordingly in the *Dravo* case silence of Congress was insufficient to confer an immunity from State taxation, whereas here, as was true in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* the silence of Congress would be insufficient to waive a recognized and established immunity. However, Congress has gone further and revealed an unmistakable intent.

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[18] The decision in the *Dravo* case followed the decision of this Court in *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514; see *Dravo* case at pp. 156 to 158. Likewise, in his testimony on January 18, 1939, before the Special Senate Committee above referred to Assistant Attorney General Morris said, at p. 43:

> In *Metcalf & Eddy* v. *Mitchell,* the Federal income tax was sustained as applied to a firm which did consulting engineering work under contracts with States and municipalities. That case has been consistently followed, even to the point, in *James* v. *Dravo Contracting Co.,* decided at the last term of Court, that the State of West Virginia could lay a tax of 2% on the gross receipts realized within the State under a contract for the construction of locks and dams for the United States.

Legislative history

At this moment a Special Committee of the Senate on Taxation of Governmental Securities and Salaries, appointed pursuant to S. Res. 303, 75th Cong., 3rd Sess., as a result of the President's Message to Congress of April 25, 1938, is giving careful consideration to the elimination of tax immunities. Not only does it reveal an unequivocal belief that such immunities exist at present and have not previously been waived, but it also reveals concern with the procedure that should be followed to eliminate them and a desire to study such procedure fully before taking steps in that direction. In the words of its Chairman, Senator Brown:

> As we see the inquiry before this committee, it divides itself into two parts: first, should we tax the income from State and municipal bonds, hereafter issued; and, second, the salaries that are paid to employees of the States and the various subdivisions of the States, and at the same time grant to the States the right to levy a tax on income from Federal bonds and on the salaries of employees of the Federal Government.
>
> The next question that comes up, and which the committee would like to hear from the departments of the Government on, is, can this be done by statute, or is a constitutional amendment required, and it seems to me, as a corollary to that proposition, there is a further question. If it can be done by

> statute, should it be so done, or should the Congress submit the question to the States for a clear-cut expression from them as to what they think should be done.
>
> There are many incidental problems to this, but I think those are the main propositions upon which to base our inquiry. Hearings, January 18, 1939, pp. 3, 4.

Congress has recognized that the elimination of such immunities is peculiarly a problem for the legislature; that a comprehensive, not an interstitial program is required.[17] Thus, it desires to avoid inequitable retroactive taxation. See, e. g., H. R. 1653, H. R. 1831, S. 482, S. 554, all 76th Cong., 1st Sess.; President's Message to Congress of January 19, 1939. It desires adequate and well defined safeguards to prevent discrimination and to assure reciprocity. See, e. g., Hearings before House Committee on Ways and Means on H. J. Res. 102, 67th Cong., 1st Sess., p. 11, and H. R. 1655, 76th Cong., 1st Sess., which provides:

> The compensation received as such by officers and employees of the United States and

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[17] U. S. Rev. Stat., Sec. 5219, is an excellent illustration of such comprehensive legislation carefully drafted to determine the kinds of State taxation Congress desired to permit with respect to national banks and designed to prevent discrimination by the States in favor of their own institutions. A recent example of such comprehensive legislation consenting to taxation and avoiding discrimination and double taxation may be found in the Act of March 12, 1936, c. 138, 49 Stat. 1160. See, also, *infra*, note 19.

> its instrumentalities shall be subject to the taxes of the various States in which they have their legal residences in the same manner and to the same extent as the compensation of the other residents of such States: *Provided*, That this provision shall be applicable only to the residents of States which by law likewise make the compensation of the officers and employees of those States and their political subdivisions and instrumentalities subject to the taxes imposed by the internal-revenue laws of the United States.

It also desires, as stated above by the Chairman of the Special Senate Committee, to consider submission of the question to the States as well as to Congress, regardless of constitutional or legal requirements.[18]

Doubt as to the appropriate constitutional or legal procedure for subjecting State securities and employees to federal income taxation would appear to have been a factor in delaying Congressional action (cf. President's Message to Congress of April

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[18] Where a matter affecting interstate commerce is national in character and admits of a uniform and comprehensive plan of regulation, the absence of federal legislation is construed as a declaration that such commerce shall not be burdened by the States. As this Court said in *Brown v. Houston*, 114 U. S. 622, at page 630:

> * * * the power of Congress is exclusive wherever the matter is national in its character or admits of one uniform system or plan of regulation * * * So long as Congress does not pass any law to regulate commerce among the several States, it thereby

25, 1938), but this factor itself merely emphasizes the unwillingness of Congress to consent to State taxation of the income from federal securities and of federal employees without being assured of a reciprocal federal tax. When Congress has been willing to permit the taxation of income enjoying federal immunity without requiring a corresponding federal tax upon similar income enjoying State immunity, it has not hesitated to do so. For example, it has consented to State taxation of income from federal oil lands. *British-American Oil Co.* v. *Board of Equalization*, 299 U. S. 159; *Mid-Northern Oil Co.* v. *Walker*, 268 U. S. 45.[19]

> indicates its will that that commerce shall be free and untrammeled * * *

And in *Bowman* v. *Chicago and Northwestern Railway Co.*, 125 U. S. 465, Mr. Justice Field said in a concurring opinion, at page 508:

> The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.

See also *Kelly* v. *Washington*, 302 U. S. 1, 9. For the applicability of such cases to federal immunity from State taxation see footnote 14, *supra*.

In the instant case Congress has gone further and indicated an unmistakable intent with respect to a matter of much concern to it.

[19] Other such consents to State taxation are very common as may be seen from an examination of the statutes of the 73rd Congress, the 74th Congress, and the 75th Congress, 1st Session alone. Real estate is frequently subjected to nondiscriminatory State taxation. Act of June 13, 1933, c. 64, 48 Stat. 130; Act of June 16, 1933, c. 89, 48 Stat. 177; Act of June 16, 1933, c. 98, 48 Stat. 267, Act of January 31, 1934, c. 7, 48 Stat. 347; Act of April 27, 1933, c. 168, 48 Stat. 64[illegible]

The President's Message to Congress of April 25, 1938, summed up the belief of years when it stated that:

> the States, under existing decisions, [do not] levy income taxes on the salaries of the hundreds of thousands of Federal employees.

It urged:

> that effective action be promptly taken to terminate these tax exemptions for the future

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Act of June 27, 1937, c. 847, 48 Stat. 1252, 1255, 1257; Act of August 23, 1935, c. 614, 49 Stat. 700; Act of July 22, 1937, c. 517, 50 Stat. 531. Personal property likewise is frequently subjected to non-discriminatory State taxation as are also shares of stock in government instrumentalities when owned by private individuals. Act of June 16, 1933, c. 98, 48 Stat. 267; Act of June 26, 1934, c. 750, 48 Stat. 1222; Act of July 22, 1937, c. 517, 50 Stat. 531. In numerous instances government instrumentalities are subjected to limited State taxation or to State taxation to the same extent as similar State institutions or instrumentalities. Act of June 13, 1933, c. 64, 48 Stat. 133; Act of June 18, 1934, c. 585, 48 Stat. 993; Act of June 26, 1934, c. 750, 48 Stat. 1229; Act of June 27, 1937, c. 847, 48 Stat. 1249, 1255; Act of March 12, 1936, c. 138, 49 Stat. 1160; Act of April 17, 1937, c. 108, 50 Stat. 68; Act of August 25, 1937, c. 772, 50 Stat. 806. In still other instances the United States or its instrumentalities are authorized to pay certain amounts to the States or local taxing units in lieu of taxes. Act of May 18, 1933, c. 32, 48 Stat. 66; Act of April 13, 1934, c. 116, 48 Stat. 577; Act of June 29, 1936, c. 860, 49 Stat. 2026; Act of June 29, 1936, c. 868, 49 Stat. 2036; Act of May 28, 1937, c. 277, 50 Stat. 221; Act of July 22, 1937, c. 517, 50 Stat. 531; Act of August 9, 1937, c. 570, 50 Stat. 570; Act of August 28, 1937, c. 876, 50 Stat. 876; Act of September 1, 1937, c. 896, 50 Stat. 895.

and recommended specifically that

> Congress enact legislation ending tax exemption on Government salaries of all kinds * * *.

The President's Message to Congress of January 19, 1939, was addressed largely to the inequities arising from retroactive taxation under the decision of *Helvering* v. *Gerhardt, supra,* but reiterated the original recommendation for—

> legislation * * * to make private income from all Government salaries hereafter earned * * * subject to the general income tax laws of the Nation and of the several States.

The government witnesses before the Special Senate Committee above referred to expressed the same views. Honorable John W. Hanes, Under Secretary of the Treasury, stated that the Treasury Department—

> urges approval of the proposal * * * to consent to the taxation of the salaries of Federal employees by State and local governments. Hearings, January 18, 1939, p. 4.

Honorable James W. Morris, Assistant Attorney General, likewise endorsed legislation that—

> would permit State taxation of * * * the salaries of Federal officers and employees within their taxing jurisdiction. Hearings, January 18, 1939, p. 36.

In his Message to Congress of April 25, 1938, the President recognized that the views he expounded had been constantly urged on Congress for many

years but that no action has been taken by it. He said:

> For more than 20 years Secretaries of the Treasury have reported to the Congress the growing evils of these tax exemptions.

And Under Secretary Hanes in his above-mentioned testimony in considering the objections that have been raised to the elimination of tax exemption said, at pp. 11–12, that—

> One such objection is that since intergovernmental exemptions have been imbedded in our legal structure for many years, action should be delayed until further study is made of the problem.

He said further, specifically with respect to tax-exempt securities, although this question arose in Congress generally in connection with measures that also dealt with tax-exempt salaries, at p. 4:

> The discontinuance of the issuance of tax-exempt securities by Federal, State, and local governments has been urged consistently by the Treasury Department during many administrations. Condemnation of the inequity resulting from the issuance of such securities has been voiced by former Secretaries Glass, Houston, Mellon, and Mills and by Secretary Morgenthau and my predecessor, former Under Secretary Magill. Almost without exception every spokesman of the Treasury Department since the advent of progressive income taxation has urged the elimination of tax exemption; none has

> ever spoken in favor of its retention. A typical position was that taken by former Secretary Mellon who, more than 15 years ago, wrote the acting chairman of the Committee on Ways and Means:
>
> "* * * it is almost grotesque to permit the present anomalous situation to continue, for as things now stand we have on the one hand a system of highly graduated Federal income surtaxes and on the other a constantly growing volume of securities * * * which are fully exempt from these surtaxes, so that taxpayers have only to buy tax-exempt securities to make the surtaxes ineffective. (December 21, 1922.)"
>
> Former Presidents of the United States, including Presidents Harding, Coolidge, and Hoover, have urged the elimination of tax exemption. This position has been endorsed by a great majority of the individuals and civic organizations who have studied the problem.

And as Assistant Attorney General Morris stated in his above-mentioned testimony, at p. 59:

> Every President of the United States since 1920 has recommended to the Congress that action be taken effectively to terminate the exemption of income from the so-called immune sources. Various hearings have been had on joint resolutions for constitutional amendments, beginning in 1922, and as late as 1937.

Similar detailed testimony was given before the House Committee on Ways and Means, 76th Cong.,

1st Sess., in its Hearings on Tax-Exempt Salaries, on January 26, 1939, pursuant to the President's Message to Congress of January 19, 1939. For example, Under Secretary Hanes said that:

> At present Federal employees are subject to Federal but are exempt from State income taxes. Hearings, January 26, 1939, p. 4.

Turning briefly to the measures that have been introduced in Congress and to the opinions expressed by its members and by and before the Congressional Committees having charge thereof we find a consensus regarding the existence of an immunity of federal officers and employees from State taxation. Yet, despite full consideration and ardent sponsorship, Congress has refused to act. We shall refer only to a few here.

In 1922 the House Committee on Ways and Means considered H. J. Res. 102, 67th Cong., 1st Sess., which proposed a constitutional amendment providing in part that States might tax the salaries of "all public officials of the United States." In 1937 in the Hearings of the Subcommittee of the Senate Committee on the Judiciary on S. J. Res. 5 and S. J. Res. 154, Senator Byrd said at page 46:

> * * * At the present time, as the committee knows, all compensation paid to employees or officers by the Federal Government is exempt from taxation by any State * * *

On April 7, 1938, during the consideration of H. R. 9682, 75th Cong., 3d Sess., Senator Hitch-

cock urged consideration of S. J. Res. 261, which he had introduced and which provided, in part, that—

> Each State shall have power to lay and collect taxes on income derived from compensation of all public officers and employees of the United States or any instrumentality thereof * * *

and stated that—

> There are now pending over 25 proposed constitutional amendments on this subject introduced during the Seventy-fifth Congress.

Likewise, in including in the Congressional Record an address by Honorable John Philip Wenchel, Chief Counsel, Bureau of Internal Revenue, Treasury Department, which said, in part, that—

> There is no doubt, of course, that Congress has the power to subject Federal securities and Federal officeholders to taxation by a State which, but for the cloak of the immunity, would have the jurisdiction to tax. * * *

Congressman Voorhis stated that—

> Removal of tax-exempt privileges is, I believe, one of the first duties of Congress.

Cong. Rec., Vol. 83, Part 10, p. 2155.

See also remarks of Congressman Cochran, at 81 Cong. Rec. 3380, Congressman Treadway, at 82 Cong. Rec. App. 529, and Congressman Hancock, at 83 Cong. Rec. App. 1183, regarding H. R. 8249;

and see also S. 2528, H. R. 8249, H. J. Res. 443, H. J. Res. 444, H. J. Res. 521.

During the current session of Congress at least nine measures have already been introduced all intent upon *waiving* existing immunities. See, e. g., H. R. 1655, quoted above, at pp. 50–51. In addition see H. R. 786, 3590, S. J. Res. 26, H. J. Res. 21, 39, 48, 49, and 59.

Unlike random individual expressions in Congressional debates and before Congressional Committees which are without weight in interpreting specific statutory provisions—*McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488—the foregoing legislative material is clearly competent. See *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 19; *Penn Mutual Co.* v. *Lederer*, 252 U. S. 523, 534; *U. S.* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 279; *Federal Trade Commission* v. *Raladam*, 283 U. S. 643, 650. It is designed to reveal a background of full legislative consideration of the instant problem and of a consistent point of view, and includes such pertinent material as Presidential messages, remarks of a Committee Chairman, and testimony of responsible executive officials who were invited to testify because the instant problem is within the range of their official activities and whose administrative interpretations would themselves be relied on by this Court as a guide to legislative intent.

It is apparent, therefore, that despite the introduction of numerous measures to eliminate the immunity, despite full consideration by appropriate committees, and despite ardent sponsorship in Congress and outside, Congress has refused to permit the taxation of federal salaries by the States. Taxation for past years, such as the instant case involves, is clearly not wanted. How the immunities should be eliminated and how such elimination should be conditioned has caused much discussion through the years and is the subject of the present inquiries of the Special Senate Committee and of the House Ways and Means Committee, which are endeavoring to evolve a comprehensive plan and procedure regarding the elimination of such immunities. Unmistakably it is the present intention of Congress that the immunities shall stand until this is done.

Executive History

We have set forth in the immediately preceding pages the view of the executive branch of the government, long adhered to and constantly reported to Congress, that federal salaries and securities are immune from State income taxation. We have also demonstrated that for many years the Presidents and the Secretaries of the Treasury have requested Congress to eliminate such immunities. Indeed since 1860 an opinion of the Attorney General has stood unchanged, that likewise asserted

unequivocally the immunity of federal officers and employees from State taxation. It provided as follows:

> SIR: The authorities of a State cannot impose a tax upon the salary of a federal officer, or upon the compensation paid by the United States to any person engaged in their service. This was decided by the Supreme Court in the case of *Dobbins* vs. *the Commissioners of Erie County,* (16 Peters, 435). The act of the Virginia Legislature, which you cite in your letter of September 15th, does not authorize such taxation. The demand, therefore, upon the clerks of the Wheeling post office, is not warranted by any legal or constitutional authority, State or national.
>
> Very respectfully, yours, &c.,
>
> J. S. BLACK.
>
> Hon. JOSEPH HOLT,
> *Postmaster General.*

9 Op. A. G. 477.[20]

Even when such interpretations are not specifically called to the attention of Congress—*National Lead Co.* v. *U. S.*, 252 U. S. 140, 146; *Copper Queen Mining Co.* v. *Arizona Board,* 206 U. S. 474, 479—the silence of the latter in failing to alter such interpretation by legislation is deemed to be an

[20] The recent study by the Department of Justice, entitled "Taxation of Government Bondholders and Employees—The Immunity Rule and the 16th Amendment," in connection with the President's Message to Congress of April 25, 1938, is addressed to federal income taxation of State securities

adoption thereof unless clearly erroneous. Thus, with respect to existing statutes, this Court said in *U. S.* v. *Finnell,* 185 U. S. 236, at page 244:

> If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge.

And in *U. S.* v. *Minnesota,* 270 U. S. 181, this Court said at p. 205:

> The Act of 1860 was construed as we here construe it by Secretary Delano in 1874,

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and salaries, but it had occasion to consider the power of Congress to waive the immunity of federal salaries and securities from State taxation saying, at pp. 4-5:

> CHAPTER I
>
> THE SCOPE OF THE FEDERAL TAXING POWER
>
> Federal legislation subjecting federal and state bondholders, officers, and employees to income taxation apparently contains rather fewer constitutional difficulties than would be the case were the legislation enacted by the states. This simplification results because of (a) the power of Congress to waive federal immunity, and (b) the scope of the federal taxing power as contrasted to that of the states.
>
> A. THE POWER OF CONGRESS TO WAIVE THE IMMUNITY OF FEDERAL BONDHOLDERS, OFFICERS, AND EMPLOYEES
>
> It may be expected that, as a part of any program to restrict the exempt classes, Congress would grant to the states authority to tax the interest paid on subsequent issues of United States securities and the compensation thereafter paid to officers and employees of the United States. There seems no room for doubt but that Congress has full power to waive whatever

> 1 Copp's P. L. L. 475, and by Secretary Schurz in 1877, 2 *id.* 1081; and their construction was adopted and applied by their successors up to the time of this suit, and was approved by the Attorney General in 1906, 25 Op. 626. So, even if there were some uncertainty in the Act, we should regard this long-continued and uniform practice of the officers charged with the duty of administering it as persuasively determinative of its construction.

See also *Helvering* v. *Winmill*, No. 11, October Term, 1938; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *New York Central Securities Corp.* v. *U. S.*, 287 U. S. 12, 24; *U. S.* v. *Shreve-*

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immunity against state taxation might otherwise be claimed by those who deal with the United States.

Van Allen v. *The Assessors*, in an extended dictum, declared Section 5219 of the Revised Statutes to be constitutional. That section permits nondiscriminatory state taxation of national bank shares. One of the grounds of this decision was that Congress could waive the tax immunity of its instrumentalities. This view has consistently been followed, with respect both to Section 5219 and to other waivers of immunity. And in *Helvering* v. *Gerhardt* the Supreme Court explained the wider scope of the federal taxing power, as opposed to that of the states, in part because of the greater readiness with which Congress will waive a constitutional immunity.

There can, therefore, be no constitutional problem with respect to the power of Congress to waive the tax immunity which perhaps otherwise could be claimed by the federal bondholders, officers, and employees. Whether or not the nature of an income tax is such as to make its source immaterial, Congress has full power to declare that the immunity of the federal source of such income shall not extend to its recipient.

port Grain & Elevator Co., 287 U. S. 77, 84; *U. S.* v. *Sweet*, 189 U. S. 471, 473. Congressional inaction where no federal statute exists, and where there has been both power and opportunity on the part of Congress to act, can stand on no different footing. Cf. *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*.

It follows that when such an executive interpretation has long been adhered to, has consistently been reported to Congress and has been fully considered by Congress, and when despite constant urging that it be eliminated Congress has refused to act, Congress is deemed to intend to preserve the executive interpretation so set forth.

The reasonableness of the executive interpretations so made is evidenced by the confirmation this Court has given them since the *Dobbins* case. Moreover, this Court has indicated that the greater readiness of Congress than of the States to waive an immunity from taxation is a further practical ground for affording the federal immunity stricter protection. Thus it said in *Helvering* v. *Gerhardt*, *supra*, at page 417:

> Once impaired by the recognition of a state immunity found to be excessive, restoration of that power is not likely to be secured through the action of state legislatures; for they are without the inducements to act which have often persuaded Congress to waive immunities thought to be excessive.

The activities of the federal government affect the welfare of the people in all the States, and the people of one State have no means of protection against undue interference with those activities by another State except that afforded by the federal Constitution. On the other hand, each State has its representatives in Congress who may make effective protest against undue interference by the federal government with the State's activities.

CONCLUSION

We submit that the decree entered below was correct, both on principles of State law and on principles of federal immunity and federal supremacy long adhered to by this Court.

Respectfully submitted.

W. Q. VAN COTT,
Pro se.

FEBRUARY 1939.

APPENDIX

Revised Statutes of Utah

80–14–4. Gross income.

Defined.

(1) "Gross income" includes gains, profits and income derived from salaries, wages or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

Exclusions from Gross Income.

(2) The following items shall not be included in gross income and shall be exempt from taxation under this chapter: * * *

Tax-Free Salaries.

(g) Amounts received as compensation, salaries or wages from the United States or any posession [sic] thereof for services rendered in connection with the exercise of an essential governmental function.

U. S. GOVERNMENT PRINTING OFFICE 1959

FILE COPY

No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS

v.

W. Q. VAN COTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

SUPPLEMENTAL BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

SUPPLEMENTAL BRIEF FOR RESPONDENT

There have been certain legislative developments in Congress since the filing of respondent's brief that, it is submitted, are pertinent to the instant case and should be called to the attention of this Court.

On p. 42 of respondent's brief and in the discussion of "Legislative history" on pp. 49–60 of respondent's brief, reference is made to H. R. 3590, 76th Cong., 1st Sess., which was introduced by Congressman Doughton, Chairman of the House Committee on Ways and Means, to provide for the taxation of officers and employees of the United States, of the States, and of the agencies and instrumen-

talities of both. Since then this bill, as H. R. 3790, has been passed by the House of Representatives (February 9, 1939), has been transmitted to the Senate and referred to the Committee on Finance (February 13, 1939), has been reported favorably by said Committee (February 24, 1939), and is now pending in the Senate.

The bill contains a comprehensive program for the elimination of immunities of federal and State officers and employees from taxation, makes detailed provision to avoid retroactive taxation, and seeks to guard against discrimination.

With respect to a federal immunity from State taxation it provides as follows:

> SEC. 3. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

It is obvious from the consent conferred and from the emphasis placed on the operative date of that consent that, regardless of what the will of Congress may be with respect to a consent to *future* taxation, it believes and intends at the present that

no such consent exists. Moreover, if the bill is enacted in its present form, it unmistakably withholds Congressional consent to taxation for past years, such as is involved in the instant case.

The detailed House and Senate Reports [1] on the bill further substantiate this position. For example, the House Report states, at p. 1, that the bill—

> grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees * * *.

Also, in view of the statement in the House Report, at p. 4, that—

> The bill contains no express provision subjecting Federal officers and employees to Federal taxation for the reason that such a provision is unnecessary,

it can scarcely be argued that the consent provision with reference to State taxation was unnecessary. In any event the House Report states unmistakably, at p. 5, that—

> * * * section 3 consents to taxation of Federal officers and employees *only* with respect to compensation received after December 31, 1938. [Italics added.]

Similar statements are contained in the Senate Report. It will be sufficient here to refer only to the evident belief that a comprehensive legislative program is desirable, and that an immunity now

[1] House Report No. 26 and Senate Report No. 112, both 76th Cong., 1st Sess.

exists and should be waived only as to the future. Thus the Report states, at pp. 1–2, that—

> The scope of the relief granted by title II and the method of affording such relief therein provided have been devised as an integral part of the complete treatment of the problem with respect to both the future and the past;

at p. 3, that—

> At the present time, Federal employees are subject to Federal income taxes, but are exempt from State income taxes;

and at p. 12, that—

> * * * section 3 consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938.

There never was occasion for Congress to assert a federal immunity by affirmative legislation since it was considered so well settled that such immunity already existed. As is revealed by the legislative history in respondent's brief culminating in the material here presented Congressional intention could not have appeared more clearly.

Although liability to suit will be found where liability to tax will not—*Federal Land Bank* v. *Priddy*, 295 U. S. 229, 235; *Clallam County* v. *U. S.*, 263 U. S. 341; *Sloan Shipyards Corporation* v. *Emergency Fleet Corporation*, 258 U. S. 549—this Court's approach to Congressional intent in *Keifer and Keifer* v. *Reconstruction Finance Corporation*

and Regional Agricultural Credit Corporation, No. 364, October Term, 1938, is illuminating here. It said:

> Has Congress endowed Regional with immunity in the circumstances which enveloped its creation? It is not a textual problem; for Congress has not expressed its will in words. Congress may not even have had any consciousness of intention. The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute from which flow the rights and responsibilities of Regional, but in a series of statutes utilizing corporations for governmental purposes and *drawing significance from dominant contemporaneous opinion regarding the immunity of governmental agencies from suit.* [Italics added.]

In the instant case Congressional intent is even more clearly revealed.

For the convenience of this Court the Appendix hereto contains H. R. 3790 as reported out by the Senate Finance Committee, and the Senate and House Reports on this bill.

W. Q. VAN COTT,
Pro se.

MARCH 3, 1939.

APPENDIX

[H. R. 3790, 76th Cong., 1st Sess.; Report No. 112, Calendar No. 118]

[Omit the part struck through and insert the part printed in italic]

AN ACT Relating to the taxation of the compensation of public officers and employees

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Public Salary Tax Act of 1939".

TITLE I

SECTION 1. ~~(a) Section 22 (a) of the Revenue Act of 1938~~ *Section 22 (a) of the Internal Revenue Code* (relating to the definition of "gross income") is amended by inserting after the words "compensation for personal service" the following: "(including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing)".

~~(b) The amendment made by this section shall apply only to taxable years beginning after December 31, 1938.~~

SEC. 2. ~~Section 116 (b) of the Revenue Act of 1938 (exempting compensation of teachers in Alaska and Hawaii from income tax) shall not apply to any taxable year beginning after December 31, 1938~~ *Section 116 (b) of the Internal Revenue Code (exempting compensation of teachers in Alaska and Huwaii from income tax) is repealed.*

SEC. 3. The United States hereby consents to the taxation of compensation, received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

TITLE II

SEC. 201. Any amount of income tax (including interest, additions to tax, and additional amounts) for any taxable year beginning prior to January 1, 1938, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing—

(a) shall not be assessed, and no proceeding in court for the collection thereof shall be begun or prosecuted (unless pursuant to an assessment made prior to January 1, 1939);

(b) if assessed after December 31, 1938, the assessment shall be abated, and any amount collected in pursuance of such assessment shall be credited or refunded in the same manner as in the case of an income tax erroneously collected; and

(c) shall, if collected on or before the date of the enactment of this Act, be credited or refunded in the same manner as in the case of an income tax erroneously collected, in the following cases—

(1) Where a claim for refund of such amount was filed before January 19, 1939, and was not disallowed on or before the date of the enactment of this Act;

(2) Where such claim was so filed but has been disallowed and the time for beginning suit with respect thereto has not expired on the date of the enactment of this Act;

(3) Where a suit for the recovery of such amount is pending on the date of the enactment of this Act; and

(4) Where a petition to the Board of Tax Appeals has been filed with respect to such amount and the Board's decision has not become final before the date of the enactment of this Act.

SEC. 202. In the case of any taxable year beginning after December 31, 1937, and before January 1, 1939, compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall not be included in the gross income of any individual under Title I of the Revenue Act of 1938 and shall be exempt from taxation under such title, if such individual either—

(a) did not include in his return for a taxable year beginning after December 31, 1936, and before January 1, 1938, any amount as compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing; or

(b) did include any such amount in such return, but is entitled under section 201 of this Act to have the tax attributable thereto credited or refunded.

SEC. 203. Any amount of income tax (including interest, additions to tax, and additional amounts) collected on, before, or after the date of the enactment of this Act for any taxable year beginning prior to January 1, 1939, to the extent attributable to compensation for personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing, shall be credited or refunded in the same manner as in the case of an income tax erroneously collected, if claim for refund with respect thereto is filed after January 18, 1939, and the Commissioner of Internal Revenue, under regulations prescribed by him with the approval of the Secretary of the Treasury, finds that disallowance of such claim would result in the application of the doctrines in the case of Helvering against Gerhardt (304 U. S. 405) extending the classes of officers and employees subject to Federal taxation.

SEC. 204. Neither section 201 nor section 203 shall apply in any case where the claim for refund, or the institution of the suit, or the filing of the petition with the Board, was, at the time filed or begun, barred by the statute of limitations properly applicable thereto.

SEC. 205. Compensation shall not be considered as compensation within the meaning of sections 201, 202, and 203 to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof.

SEC. 206. The terms used in this Act shall have the same meaning as when used in ~~Title I of the Revenue Act of 1938~~ *Chapter I of the Internal Revenue Code.*

SEC. 207. If either title of this Act, or the application thereof to any person or circumstances, is held invalid, the other title of the Act shall not be affected thereby.

Passed the House of Representatives February 9, 1939.

Attest:

SOUTH TRIMBLE,
Clerk.

By H. NEWLIN MEGILL.

76TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT No. 26

THE PUBLIC SALARY TAX ACT OF 1939

FEBRUARY 7, 1939.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed

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Mr. DOUGHTON, from the Committee on Ways and Means, submitted the following

REPORT

[To accompany H. R. 3790]

The Committee on Ways and Means, to whom was referred the bill (H. R. 3790) relating to the taxation of the compensation of public officers and employees, having had the same under consideration, report it back to the House without amendment and recommend that the bill do pass.

The need for such a bill was set forth by the President in his message dated April 25, 1938, and again in his message dated January 19, 1939. In

these messages he pointed out that a fair and effective income tax ought to subject compensation of those who earn their livelihood from government to the same burdens as compensation from private employment. In his message of January 19, 1938 [sic], he also pointed out that, in the interest of equity and justice, immediate legislation is required to prevent recent judicial decisions from operating in such a retroactive fashion as to impose tax liability for past years on State, local, and other employees who, in good faith, believed their compensation for such years was exempt from Federal tax.

The bill subjects to Federal income tax for taxable years beginning after December 31, 1938, the compensation of all State and local officers and employees; grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees; and, in accordance with the President's message, relieves from Federal income taxation for taxable years commencing prior to January 1, 1939, the compensation of certain State and local officers and employees.

For many years the exemption from Federal income taxes of State and local officers and employees has aroused widespread public criticism and disapproval. Similarly, the exemption of the compensation of Federal officers and employees from income taxes imposed under the authority of the various States has been widely condemned.

These exemptions, which are not provided expressly in the Constitution, have been thought to be required by the decisions of the Supreme Court, based upon the implications of the Constitution.

Several recent decisions of the Supreme Court, particularly at the October 1937 term, have considered the subject of intergovernmental tax immunities. These decisions make it clear that many of the assumptions heretofore entertained as to the scope of these tax immunities are erroneous. They indicate that there is no constitutional objection to the nondiscriminatory taxation, under the Federal income tax, of the compensation of officers and employees of the various States and their political subdivisions, agencies, and instrumentalities. This view is fortified by the opinion of the Supreme Court in the case of *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938). A comprehensive study of the taxation of State and local officers and employees made by the Department of Justice indicates that such taxation of compensation is constitutional.

This bill therefore provides in a clear and unequivocal manner for such taxation. If there are any possible doubts as to the validity of this taxation, the bill thus enables the issue to be squarely presented to the Supreme Court.

The validity of the application of income taxes imposed under the authority of the various States to the compensation of officers and employees of the Federal Government, however, may be governed by other considerations. There are certain indications in the case of *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), which were repeated in the *Gerhardt case*, that while State and local officers and employees may be subjected to Federal income tax, Federal officers and employees may not, without the consent of the United States, be subjected

to income taxation under the authority of the various States. Your committee believes that it is essential to a fair solution of the problem presented by intergovernmental tax immunities that Federal officers and employees should, like other individuals, be subject to income taxation under the authority of the States. The bill, therefore, contains an express consent to such taxation. The provisions heretofore referred to appear in title I of the bill.

Information presented to the committee indicates that in the year 1937 there were approximately 2,600,000 State and local officers and employees and 1,200,000 Federal officers and employees and that the State and Federal pay rolls were $3,600,000,000 and $1,900,000,000, respectively. The committee has been informed that the average level of salaries paid by State and local governments is comparatively low so that the inclusion of the compensation of such employees in gross income subject to the Federal income tax is not expected to result in the addition of more than $16,000,000 annually to the Federal revenues. Inasmuch as there is considerable diversity in the provisions of the various State income tax laws, it is extremely difficult to estimate the probable effect on State revenues of the imposition of State income taxes upon compensation received by Federal officers and employees.

As a consequence of the *Gerhardt* decision of the Supreme Court it now appears that a considerable number of State and local officers and employees who heretofore believed in good faith that they were not subject to Federal income taxation may

now be required to pay Federal income tax for past years. If no returns were filed by such persons, this liability may extend back for a period of more than 12 years. Since these persons, as a class, are dependent upon their salaries for support, and are not prepared to meet such a heavy liability, your committee believes that relief should be given to such officers and employees. Title II of the bill therefore provides that assessment of tax against such officers and employees for prior years shall not be made and also provides for refunds of tax paid.

Proper restrictions are inserted in the bill to insure that the limitations upon assessment and provisions for refund in title II will not apply in the case of those groups of State and local employees whose liability for Federal income tax was established some years ago. Since these employees have been regularly paying Federal income tax and therefore were in no way surprised by the recent decisions of the Court, your committee believes that it would be improper to relieve such employees of their tax liability for past years.

The scope of the relief granted by title II and the method of affording such relief therein provided have been devised as an integral part of the complete treatment of the problem with respect to both the future and the past. In view of this interrelation between titles I and II, it is imperative that the bill be passed in its entirety. Any separation of title I would require a reexamination of the scope and functioning of title II. Moreover, your committee realizes that the relief accorded in title II will render moot certain cases now pending which, if they were allowed to proceed to final

decision, would settle important phases of the problem of intergovernmental tax immunities. The disadvantages of such abandonment of pending litigation, however, are outweighed by the fact that future taxation of all State and local salaries is clearly established by the express legislation in title I.

A description of the provisions of the bill in detail now follows:

TITLE I. PROSPECTIVE TAXATION OF PUBLIC EMPLOYEES

Section 1: Section 1 of the bill amends section 22 (a) of the Revenue Act of 1938 (which defines gross income) by providing expressly that there shall be included in gross income, salaries, wages, or compensation for "personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing." Under this amendment the wages, salaries, and compensation of all officers and employees of the respective States and of their political subdivisions and agencies and instrumentalities, without exception, are included in gross income. The committee recognizes that the language of section 22 (a) as it previously existed was broad enough to include in gross income the compensation of such officers and employees. The Treasury Department, however, believing the compensation of some of these officers and employees to be constitutionally exempt has, until recently, by administrative action treated their compensation as nontaxable. This administrative action, followed by repeated reenactment of the statutory provisions

without change, might lead to the contention that Congress by such reenactment had exempted such State and local officers and employees. This contention would only serve to confuse the issue of the constitutionality of the future taxation of all State and local officers and employees. To eliminate the possibility of such confusion, therefore, your committee recommends amendment of the Revenue Act of 1938 to insert the proposed language so that there can be no doubt whatever of the intention of Congress that all State and local officers and employees, without exception, shall be subject to Federal income tax for taxable years beginning after December 31, 1938. It is not to be inferred from this amendment, however, that those groups of State and local officers and employees from whom Federal income taxes have previously been collected were not subject to tax under the language of section 22 (a) in earlier revenue acts or in the Revenue Act of 1938 as it existed prior to the amendment proposed in the bill.

The bill contains no express provision subjecting Federal officers and employees to Federal taxation for the reason that such a provision is unnecessary. The uniform construction of the definition of gross income in all revenue acts has been that they are subject to tax and their liability to Federal tax is established beyond question.

Section 2: Section 116 (b) of the Revenue Act of 1938 provides for the exemption from Federal income tax of compensation of teachers in educational institutions employed by Alaska or Hawaii, or any political subdivision thereof. Since all teachers employed by the States will be subject to

Federal income tax under section 1 of the bill, it is believed proper to eliminate the exemption referred to so that teachers in the Territories of Alaska and Hawaii will be subject to tax to the same extent as teachers in the various States. Section 2, therefore, provides that section 116 (b) of the Revenue Act of 1938 shall not apply to any taxable year beginning after December 31, 1938.

Section 3: In order to facilitate reciprocal taxation as between State and Federal Governments, your committee believes that the United States should expressly consent to the taxation of the compensation of its officers and employees. Section 3 of the bill therefore provides that the United States consents to the taxation of compensation received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory, or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensation.

It will be noted that the consent extends to taxation not only by the State but also by other duly constituted taxing authorities, of the compensation of Federal officers and employees. Under this provision if any local governmental units have authority to and do impose income taxes, tax may be imposed upon such compensation subject to the jurisdiction of such units.

The consent is not intended to operate, nor could it operate, as a consent to any taxation to which as

individuals these officers and employees are entitled to object either under the provisions of the Federal Constitution or of the constitutions or statutes of the respective States. For example, the consent has no effect upon the rights of an officer of the Federal Government to object that the imposition of a State tax upon him is invalid under the fourteenth amendment. Thus he may urge that a particular tax is invalid as to him because of an unreasonable classification, or the lack of geographical jurisdiction to tax, or for other reasons. Similarly, the consent has no effect upon the rights which such officers and employees possess as individuals under the various State constitutions and laws. To protect the Federal Government against the unlikely possibility of State and local taxation of compensation of Federal officers and employees which is aimed at, or threatened the efficient operation of, the Federal Government, the consent is expressly confined to taxation which does not discriminate against such officers or employees because of the source of their compensation. Inasmuch as section 1 relating to State and local officers and employees applies only with respect to years beginning after December 31, 1938, section 3 consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938.

Title II. Retroactive Relief to Certain State and Local Officers and Employees

This title affords relief to employees of States of the Union and their local governments who have not been paying Federal income tax and in many

cases have not even filed returns, but who may, under *Helvering* v. *Gerhardt*, be subject to Federal income tax for past years. However, there are certain groups of State and local employees, particularly those engaged in proprietary functions (such as the operation of State liquor stores), who have for a number of years regularly paid Federal tax because their liability was fully established at an earlier date. It would be unfair and inequitable to relieve this group of employees from tax liability which was in no way a surprise to them and which they paid without question. It is therefore undesirable to relieve, in blanket fashion, all State and local officers and employees from liability for income tax in earlier years. Since the groups who should not be relieved have regularly paid their income tax and it has been currently assessed, while those who have been surprised by the *Gerhardt case* and who should be given relief have, in most cases, not paid their tax and have not been assessed, the general plan of title II is to provide that assessments previously made shall not be disturbed but that no new assessments shall be made.

Title II applies only to State and local officers and employees and not to other persons having dealings with State and local governments, since the taxability of the compensation of such other persons has long been recognized. Such persons are generally held to be independent contractors for purposes of Federal income taxation. Their liability for such tax has been clearly established since the case of *Metcalf & Eddy* v. *Mitchell* (1926), 269 U. S. 514, and they are not officers and employees within the meaning of this bill.

Section 201: Section 201 applies to Federal income tax (including interest, additions to tax, and additional amounts), for taxable years beginning prior to January 1, 1938, attributable to compensation for personal service as an officer or employee of a State or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing.

Subsection (a) provides that income tax attributable to the compensation of such officers and employees for years beginning prior to January 1, 1938, which was not assessed prior to January 1, 1939, shall not be assessed and no proceeding in court for the collection thereof shall be begun or prosecuted.

Subsection (b) provides that if any such income tax for such years is assessed after December 31, 1938, the assessment shall be abated and any amount collected in pursuance thereof shall be credited or refunded in the same manner as in the case of an income tax erroneously collected. This provision thus authorizes the refund of any tax assessed against State and local officers and employees for any taxable year beginning prior to January 1, 1938, if assessment is made after 1938.

In a relatively small number of cases State and local officers and employees who are in all respects analagous to the groups given relief under section 201 (a) and (b) have paid their tax but have contested their liability by way of claim for refund rather than by contesting a deficiency asserted against them. It would be inequitable to deny relief to these people who have paid their taxes and at the same time grant relief to similarly situated

persons who have not paid their taxes. Section 201 (c) therefore provides for credit or refund to such persons of income tax, for any taxable year beginning prior to January 1, 1938, attributable to compensation received as a State or local officer or employee, if the tax has been collected on or before the date of enactment of the bill, in the following cases:

(1) where a claim for refund of such amount was filed before January 19, 1939 (the date of the President's message), and was not disallowed on or before the date of the enactment of this bill:

(2) where such claim was so filed but has been disallowed and the time for beginning suit with respect thereto has not expired on the date of the enactment of this bill;

(3) where a suit for the recovery of such amount is pending on the date of the enactment of this bill; and

(4) where a petition to the Board of Tax Appeals has been filed with respect to such amount and the Board's decision has not become final before the date of the enactment of this bill.

It is believed that the foregoing cases include virtually all State and local officers and employees who are entitled to relief from liability and who have paid their tax. In general, subsection (c) does not include those State and local officers and employees who are not entitled to relief, such as those engaged in proprietary functions, because, their liability having been previously clearly established, they have not filed claims for refund or otherwise asserted their rights in any of the ways described in this subsection.

Section 202: As has been stated, section 201 applies only with respect to income tax for taxable years beginning prior to January 1, 1938. Your committee believes, however, that it is fair and equitable to relieve State and local officers and employees in the groups which are entitled to relief from income tax liability for taxable years commencing during 1938. Section 202 accomplishes this result without at the same time relieving from liability the groups of State and local officers and employees, such as those engaged in proprietary functions, whose liability for Federal income tax was long previously established. It provides that a State or local officer or employee who did not include his compensation received as such in his return for a taxable year beginning during 1937, shall not include in gross income for a taxable year beginning in 1938 compensation received as such an officer or employee. Obviously, if an individual did not file a return he did not include his compensation in his return. Under this provision a person who, for the first time, becomes during 1938 an officer or employee of a State or political subdivision or agency or instrumentality thereof will be exempt from income tax for his taxable year beginning in 1938 with respect to his compensation received as such. This section also provides that although a State or local officer or employee included his compensation in gross income for a taxable year beginning during 1937, he shall be exempt from tax for the taxable year beginning during 1938, if he is entitled under section 201 to obtain credit or refund of the tax paid for the taxable year beginning during 1937.

Section 203: Sections 201 and 202 afford relief to virtually all State and local officers and employees equitably entitled thereto for taxable years beginning prior to 1939. It is possible, however, that there may be a few cases, not ascertainable at this time, which are not covered by these sections. For example, a public-school teacher may have paid tax on his compensation for the taxable year 1937 and, although intending to contest his liability therefor, had not filed claim for refund before January 19, 1939 (and therefore is not given relief by section 201). Since those public employees who did not pay tax are relieved from liability by sections 201 and 202, similar relief should be granted in the case of the teacher who paid his tax. Likewise, an employee of the Port of New York Authority who paid tax with respect to his compensation, but who had not filed claim for refund before January 19, 1939, should be given relief. Section 203, therefore, authorizes the Commissioner, under regulations prescribed by him with the approval of the Secretary, to grant relief by way of credit or refund. Such credit or refund under this section is to be made only if the State or local officer or employee files a claim therefor after January 18, 1939, and the Commissioner finds that disallowance of the claim would result in the application of the doctrines in the case of *Helvering v. Gerhardt* extending the classes of officers and employees subject to Federal taxation. Such relief may be granted by the Commissioner with respect to claims for refund for a taxable year beginning during 1938 as well as all taxable years

prior thereto, subject to the qualification of section 204.

Section 204: Section 204 provides that the claims for refund, suits, or petitions to the Board referred to in the preceding sections are subject to the statute of limitations properly applicable thereto.

Section 205: This section provides that "compensation" as used in sections 201, 202, and 203 shall not include compensation to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof.

Section 206: This section provides that the terms used in the bill shall have the same meaning as when used in title I of the Revenue Act of 1938.

Section 207: This section provides for the separability of the titles of the bill.

CHANGES IN EXISTING LAW

In compliance with paragraph 2a of Rule XIII of the Rules of the House of Representatives, changes in the Revenue Act of 1938 made by the bill are shown as follows: New matter is printed in italics, matter proposed to be omitted is enclosed in black brackets, and existing law in which no change is proposed is shown in roman:

SEC. 22. GROSS INCOME

(a) GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (*including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the*

foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

* * * * *

Section 116 (b) of the Revenue Act of 1938 (which is made inapplicable to taxable years 1939 and following) reads as follows:

SEC. 116. EXCLUSIONS FROM GROSS INCOME

In addition to the items specified in section 22 (b), the following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * *

(b) TEACHERS IN ALASKA AND HAWAII.—In the case of an individual employed by Alaska or Hawaii or any political subdivision thereof as a teacher in any educational institution, the compensation received as such. This subsection shall not exempt compensation paid directly or indirectly by the Government of the United States.

Calendar No. 118

76TH CONGRESS
1st Session

SENATE

REPORT
No. 112

PUBLIC SALARY TAX ACT OF 1939

FEBRUARY 24, 1939.—Ordered to be printed

Mr. BROWN, from the Committee on Finance, submitted the following

REPORT

[To accompany H. R. 3790]

The Committee on Finance, to whom was referred the bill (H. R. 3790) relating to the taxation of the compensation of public officers and employees, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

A desire to obtain the end toward which this legislation is directed has been felt generally since the adoption of the graduated income tax. It has been widely conceded that a fair and effective income tax ought to subject the compensation of public officers and employees to the same general burden of taxation as is borne by private citizens.

The need for this legislation was emphasized by the President in his message dated April 25, 1938, and again in his message dated January 19, 1939. In addition to pointing out the equity involved in subjecting the future salaries of those who earn their livelihood in governmental service

to the income-tax laws of the Nation and of the several States, the President, in his message dated January 19, 1939, drew attention to the requirement of immediate legislation to prevent recent judicial decisions from operating in such a retroactive fashion as to impose tax liability for past years on State, local, and other employees who, in good faith, believed their compensation for such years was exempt from Federal tax.

Title I of the bill subjects to Federal income tax for taxable years beginning after December 31, 1938, the compensation of all State and local officers and employees and grants consent to the States to tax the compensation received after December 31, 1938, by Federal officers and employees. Title II, in accordance with the President's message, relieves from Federal income taxation for taxable years commencing prior to January 1, 1939, the compensation of such State and local officers and employees as were affected by recent Court decisions.

The scope of the relief granted by title II and the method of affording such relief therein provided have been devised as an integral part of the complete treatment of the problem with respect to both the future and the past. In view of this interrelation between titles I and II, it is imperative that the bill be passed in its entirety. Any separation of title I would require a reexamination of the scope and functioning of title II. Moreover, your committee realizes that the relief accorded in title II will render moot certain cases now pending which, if they were allowed to proceed to final decision, would settle important phases of the problem of

intergovernmental tax immunities. The disadvantages of such abandonment of pending litigation, however, are outweighed by the fact that future taxation of all State and local salaries is clearly established by the express legislation in title I.

The entire problem of intergovernmental immunity, with respect to income taxation, has been under the scrutiny of the Special Committee on Taxation of Governmental Securities and Salaries under the chairmanship of Mr. Brown. This committee was established by Senate Resolution 303 (75th Cong., 3d sess.) and consists of three members of the Committee on Finance (Mr. Byrd, Mr. Townsend, and Mr. Brown) and three members of the Committee on the Judiciary (Mr. Logan, Mr. Austin, and Mr. Miller).

Considerable testimony, both written and oral, has been presented to this special committee at hearings beginning on January 18, 1939, and ending February 16, 1939. Many briefs and memoranda were received on various phases of the problem of intergovernmental tax immunities. However, this material, as well as the oral testimony dealt almost exclusively with the question of the taxation of bond interest. That committee is not yet prepared to make a recommendation with regard to this question. Similarly, your committee expresses no opinion upon the taxation of interest from governmental securities. It believes, as does the special committee, that the problems involved in the two phases of this question present separate and distinct economic and legal aspects and that the Supreme Court may uphold the present bill on grounds different from those applicable to the taxation of bond interest.

Legal authorities, both for and against the President's proposal, agree that there is a real and substantial distinction between the two. This was brought out by questions propounded by the chairman of the special committee to witnesses appearing at the hearing. For example, Mr. Epstein, representing the attorneys general of the various States, in response to such a question, stated:

> The taxation of salaries may not impede the actual operation of the Government, and, as has been pointed out by Mr. Justice Stone, it does not follow that the taxation of the salary of an official would mean the nonperformance of his services, and it does not mean that the State would lose revenues, or that you would have to increase his salary.
>
> The taxation of interest on bonds takes an entirely different turn, and has an effect on the borrowing power of the State. So, you have there a basis for distinction.

Further evidence of the existence of such a distinction is shown from the majority opinion in *James* v. *Dravo Contracting Co.*, 302 U. S. 134, decided December 6, 1937. While this case dealt with the compensation of independent contractors, it clearly draws a distinction between compensation for services and bond interest. Speaking for the majority of the Court, Mr. Chief Justice Hughes said:

> There is no ineluctable logic which makes the doctrine of immunity with respect to Government bonds applicable to the earnings of an independent contractor rendering services to the Government. That doctrine recognizes the direct effect of a tax

which "would operate on the power to borrow before it is exercised" (*Pollock* v. *Farmers Loan & Trust Co.*, supra) and which would directly affect the Government's obligation as a continuing security. Vital considerations are there involved respecting the permanent relations of the Government to investors in its securities and its ability to maintain its credit—considerations which are not found in connection with contracts made from time to time for the services of independent contractors (pp. 152–153).

ECONOMIC ASPECTS

At the present time, Federal employees are subject to Federal income taxes, but are exempt from State income taxes. State and local employees, on the other hand, are subject to State income taxes, but are exempt from Federal income taxes, unless engaged in proprietary functions. Persons in private employment are subject to both Federal and State taxes. The number of public officers and employees has grown rapidly during the past few years. Combined Federal, State, and local employees for the year 1937 amounted to 3,800,000 and received compensation in the total amount of $5,500,000,000. This combined number represents 12 percent of the number of persons receiving wages and salaries, 13 percent of the total wages and salaries received, and approximately 9 percent of the national income.

There were approximately 2,600,000 State and local employees in 1937, representing a total annual pay roll for that year of $3,600,000,000. Many of these employees have salaries below the personal

exemptions allowed for income-tax purposes. It is estimated that for 1937, 1,000,000 or 40 percent received $1,000 or less and approximately 2,300,000 or 90 percent received $2,500 or less. Thus, 90 percent of State and local employees, if married, would not be subject to the Federal income tax. In addition, the bill would not result in imposing any further burden upon the large number of these State and local employees who are engaged in proprietary functions and are, therefore, subject to the existing Federal income tax.

From the standpoint of revenue, the exemption of State and local employees from the Federal income tax is of minor importance. It is estimated that the total Federal revenue to be derived from taxing such employees as are now exempt will not amount to more than $16,000,000 annually. However, there are individual cases of special tax privilege which show the unfairness and inequities produced by this exemption. In State and local governments, there are approximately 16,000 employees with annual salaries of over $5,000, including 1,300 with salaries of over $10,000. In case of some of the higher officers, the salaries reach $20,000, $25,000, and even larger amounts. It seems unfair to extend such tax exemption to this class of our citizens when a minor clerk, bookkeeper, or mechanic employed by a private business concern is expected to pay income taxes to both Federal and State Governments. The benefit from tax-exempt salaries is especially great if the recipients have other income, since, in such case, the salary would be subject to surtax in brackets according to the amount of the total income. These public employ-

ees are citizens of the United States and it seems hard to believe that requiring them to pay the same taxes that all other citizens pay will interefere with the functions they perform on behalf of State and local governments.

The same situation applies with respect to the Federal employees. They, too, should contribute to the support of their State and local governments, which confer upon them the same privileges and benefits which are accorded to persons engaged in private occupations. Little information has been received as to the revenue to be derived by the State and local governments from the taxation of Federal employees. The diversity in the structures of the various State income taxes, coupled with the difficulties of estimating the number of Federal employees within the taxing jurisdiction, preclude accurate estimate. In 1937 there were approximately 1,200,000 Federal employees receiving $1,900,000,000 in annual compensation. Although a salary distribution for the entire group is not available, information furnished with respect to 400,000 regular full-time civil-service employees show that approximately 6 percent of that group received less than $1,000 and 82 percent less than $2,500, annually. On the average, Federal employees would very possibly pay higher State income taxes than State and local employees would pay Federal income taxes. This is indicated by the fact that the personal exemptions accorded by State income taxes are, in many cases, below those provided by the Federal law and also by the fact that Federal salaries in the low and middle salary

range group are generally higher than those paid by State and local governments. It is believed that these employees should share in the cost of their State and local governments to the same extent as private employees.

The unfairness of this tax exemption becomes more apparent with the increased number of States which are adopting personal income taxes. At the present time, 31 States impose personal income taxes on wages and salaries, and the Federal Government receives 23 percent of its revenue from the income tax. Many of these employees who formerly shared in the cost of their State and local governments through the payment of property taxes and other indirect taxes have been relieved of liability where the income tax has been substituted for other forms of taxation.

Employees of governments receive all the benefits of government which their fellow citizens do, and consequently they should also bear their fair share of its costs. The elimination of the tax exemption privilege would not menace the operations of governmental units, but its existence does threaten the progressive income tax principle of "from each according to his ability to pay." Moreover, it discriminates among persons having the same actual income and offers to government no measurable compensating advantages. The unfair consequences of tax-exempt salaries when judged by present standards of social justice require that they be promptly abolished by legislation if this can be done under the Constitution.

CONSTITUTIONAL ASPECTS

The committee has given particular attention to the constitutional problems involved in the proposal to include in the Federal income tax the salaries paid by States and their local subdivisions to their officers and employees. There is no corresponding problem with respect to the State taxation of the salaries paid to Federal officers and employees, since Congress apparently has power to waive any immunity which might attach to its employees.

It is recognized that there is some doubt as to whether Congress has the power to subject to the Federal income tax the salaries of the Governor or other officers of a State performing functions which could not be performed by a private individual. However, your committee believes that there is sufficient probability that the measure will be held constitutional to justify its enactment.

Such a course of action has had the approval of the Supreme Court. In *Evans* v. *Gore* (1920), 253 U. S. 245, the Supreme Court held unconstitutional a provision in the Revenue Act of 1919 taxing the salaries of Federal judges then in office, notwithstanding the specific prohibition in article III of the Constitution against diminishing the compensation of judges during their term of office.

Speaking for the majority, Mr. Justice Van Devanter called attention to the fact that Congress had regarded the provision as of uncertain constitutionality and had intended the question should be submitted to and settled by the Supreme Court. The opinion cites the House and Senate reports,

as well as the statement of the chairman of the House committee in asking the adoption of the provision who said in part that "every man who has a doubt about this can very well vote for it and take the advice * * * that this question ought to be raised by Congress, the only power that can raise it, in order that it may be tested in the Supreme Court, the only power that can decide it" (56 Cong. Rec. 10370, quoted in 253 U. S. at 248, n. 1).

This bill will present a clear-cut issue for determination by the Supreme Court.

The doctrine of intergovernmental immunity does not come from the language of the Constitution itself but stems from the decision of the Court in the famous case of *McCulloch* v. *Maryland* (4 Wheat. 316) (1819). Maryland had enacted legislation designed to penalize the Bank of the United States in the operation of branches in Maryland. The legislation provided that if any bank established a branch office without State authority, any notes issued thereby must be in specified denominations and must be printed on stamped paper purchased at prescribed rates from the treasurer of the Western Shore. The bank could escape this requirement only by the payment, in advance, of $15,000. The Court held this legislation invalid on the ground that the States were powerless to hinder or obstruct the functions of the Federal Government. The plan was so devised as to make it applicable only to the Bank of the United States, as that bank was the only bank that had established branches in the State without State authority. Thus, its effect was to apply in a discriminatory

manner toward the Bank of the United States. It should be noted that the Court did not rest its decision on discrimination and that the Court subsequently rejected the argument that this case protected Federal instrumentalities only from discrimination and not from general taxation. However, Mr. Justice Stone, speaking for the majority in *Helvering* v. *Gerhardt* (304 U. S. 405) (1938), emphasized the existence of discrimination as a vital factor in the *McCulloch case.*

The next case in this series of precedents was *Dobbins* v. *Commissioner* (16 Pet. 435) (1842). The facts were that Daniel Dobbins, a captain in the United States Revenue Service, was in command of a United States revenue cutter in the Erie Station in Pennsylvania. He was rated and assessed as a citizen and resident of Erie County for county taxes upon his office as captain in such United States service. The Court held that the tax was invalid, as it was not competent for the State legislature to lay a tax on the salary or emoluments of an officer of the United States. This decision was justified upon the theory that a governmental officer was a means or instrumentality employed for carrying out the legitimate powers of the Federal Government with which the States could not interfere by taxation or otherwise, and that such officer's salary was inseparably connected with the office; that, if the officer, as such, was exempt, the salary assigned to him for his maintenance while holding office was also, for like reasons, equally exempt.

The Supreme Court, relying on the *McCulloch* and *Dobbins cases,* ruled in the case of *Collector* v.

Day (11 Wall. 113) (1870), that this immunity was reciprocal in character and that, therefore, Congress had no power under the Constitution to lay the Federal income tax upon the compensation of a State probate judge. This decision did not rest upon any constitutional right of a State officer to be exempt from a nondiscriminatory Federal tax; nor was the purpose of the immunity to confer a personal privilege upon the State officer. The reason for the invalidity of the tax was that it was regarded as burdening the functions of State government, the Court going on to say:

> It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the State, nor is there any prohibiting the States from taxing the means and instrumentalities of that Government. In both cases the exemption rests upon necessary implication and is upheld by the great law of self-preservation; as any government, whose means employed in conducting its operation is subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power may tax them at discretion? (P. 127.)

When this case was decided, it was thought to apply to all State officers and employees. Later, the Government took the position that the immunity doctrine applied only to employees engaged in the exercise of essential governmental functions and this view was upheld by the Supreme Court. The decision in *Collector* v. *Day* has not been overruled, but the application of its doctrine has been considerably limited by later decisions.

For example, in *Helvering* v. *Powers*, 293 U. S. 214 (1934), it was held that the compensation of members of the board of trustees of the Boston Elevated Railway was subject to taxation by the Federal Government on the ground that such an activity constituted a departure from the usual governmental functions, even though the enterprise was undertaken for what the States conceive to be a public benefit. For the same reason, employees of State liquor stores have been held subject to Federal taxation. In *Metcalf and Eddy* v. *Mitchell*, 269 U. S. 514 (1926), the Supreme Court held that consulting engineers engaged to advise State and political subdivisions with reference to water and sewerage projects were not State's officers or employees but independent contractors and, therefore, subject to the Federal net income tax. And in the *Dravo case*, 302 U. S. 134, the Court even held that the compensation of an independent contractor, working for the Federal Government in West Virginia, was subject to the State's 2-percent gross-receipts tax. However, it should be noted that the Federal Government conceded that the tax, even though it increased its costs, did not hinder or impede its function.

To the same effect is the case of *Silas Mason Co.* v. *Washington* (302 U. S. 186) (1937), holding that a gross receipts tax imposed by the State could be applied to the amounts received by a contractor performing, under contract with the Federal Government, work on the Grand Coulee Dam in Washington.

Then, in 1937, in *Brush* v. *Commissioner* (300 U. S. 352) the Court found that the maintenance

of the New York water supply system was an essential governmental function, and that the Federal income tax could not be applied to the compensation of an engineer employed in this activity. However, under the Treasury regulations there applicable, the salaries of State and local officers and employees engaged in essential governmental functions were specifically exempt, and, as the Government did not challenge this regulation, the pertinent question was not before the Court. The Court in *Helvering* v. *Gerhardt*, 304 U. S. 405, confined the decision in the *Brush case* to that Treasury regulation.

The next case of importance was that of *Helvering* v. *Therrell* (303 U. S. 218) (1938). Here the employees involved were attorneys or liquidators, appointed by State comptrollers, or like officers, for work in the liquidation of closed financial institutions. Their compensation came from the assets of the closed institution being liquidated, although the work was carried on by statutory authority under a department of the State government and was under the direction and control of State officers. Their compensation was held to be subject to the Federal income tax.

Finally, we reach the *Gerhardt case* (403 U. S. 405) (1938) which held that employees of the New York Port Authority were subject to the Federal income tax. The reasoning of the Court in the *Gerhardt case* indicates that if a State is performing a function which could have been undertaken by a private person, the employees of the State engaged in the performance of such function are not immune from the Federal taxing power. Un-

der this theory it seems that school teachers, State hospital employees, and other employees performing functions which are not indispensable to the existence of the State government are subject to the Federal income tax. Furthermore, the Court indicates that it has never ruled expressly on the precise question whether the Constitution grants immunity from Federal income tax to the salaries of State employees performing at the expense of the State services of the character ordinarily carried on by private citizens. This leaves open the question as to whether or not a stenographer, a bookkeeper, or a person who is not an officer of a State or political subdivision is entitled to exemption from the Federal income tax.

The reasoning of the Court in the *Gerhardt case* may be summarized as follows: By granting immunity beyond the necessity of protecting the State, the burden of the immunity is thrown upon the National Government with benefit only to a privileged class of taxpayers. While the State might possibly be affected by the tax, the burden on the State is so speculative and uncertain that if allowed it would restrict the Federal taxing power without affording any corresponding tangible protection to the State government. The taxpayers are citizens of the United States, and bound to contribute to its support. Even if the States should have to raise their salaries, the tax does not curtail any of those functions which have been thought hitherto to be essential to their continued existence as States. To insure its continued existence, it is not ordinarily necessary to confer on the State a competitive advantage over private persons.

The Court in the *Gerhardt case* did not overrule *Collector* v. *Day*, which involved the salary of an officer engaged in the performance of an indispensible function of the State which could not be delegated to private individuals. However, the *Gerhardt case* certainly narrowed the application of the immunity rule. The only basis for the immunity doctrine is the protection which it affords the continued existence of the State. It is believed that there is considerable support for the proposition that the Court will overrule or distinguish *Collector* v. *Day*, and hold that a nondiscriminatory Federal net income tax applying to all citizens, public as well as private, will not burden the functions of State or local governments. The reasons why the Court may not now feel obliged to follow *Collector* v. *Day* are as follows:

1. In *Collector* v. *Day*, the Court held the Federal income tax, enacted during the Civil War, unconstitutional as applied to the salary of a judge of a State court. The Civil War Income Tax Acts provided a quite limited number of deductions from gross income. The so-called net income tax there enacted, accordingly, rather closely approximated a tax upon gross income. The tax would, therefore, much more probably be applied to each dollar of the salary paid Judge Day than would be the case under modern income-tax legislation. The importance of this distinction is well illustrated by the recent decision of the Court in *Hale* v. *State Board*, 302 U. S. 95 (1937). There the Court said, in reference to a net income tax imposed by the State, that it was not necessarily in violation of the State statute exempting its bonds from taxation. Among

other reasons for this, Mr. Justice Cardozo said, was that—

> The returns from his occupation and investments are thrown into a pot, and after deducting payments for debts and expenses as well as other items, the amount of the net yield is the base on which his tax will be assessed.

2. The Civil War Income Acts were a novelty in fiscal legislation. The ordinary burdens of government were met largely, in the case of the Federal Government, through excise taxes; and, in the case of the State governments, through property as well as excise taxes. Faced by the emergency of the Civil War, the Congress directed the tax at income. The feeling of the State officers who were taxed and of the judges who considered its validity must have been measurably influenced by the exceptional nature of the tax. To tax income received from a State would seem much like taxing the State itself. Today, however, the Court has said, in relation to a claim for tax immunity on the part of an employee of the New York Port Authority, that: "The effect of the immunity if allowed would be to relieve respondents of their duty of financial support to the National Government" (*Helvering* v. *Gerhardt*, 304 U. S. 405).

3. The statute construed in *Collector* v. *Day* afforded no reciprocal right to the States to tax the salaries of Federal employees. In this respect, it might be said to be discriminatory against the States. The proposed legislation does permit the States to tax Federal salaries.

4. *Collector* v. *Day* was decided in 1870. Since that time the Supreme Court has not invalidated

a Federal net income tax on a State officer or employee, with the possible exception of the *Brush case,* which was placed upon the failure of the Government to challenge a Treasury regulation, since amended, which exempted salaries paid "in connection with an essential governmental function."

5. The reasoning contained in the decisions referred to as narrowing the application of the doctrine laid down in *Collector* v. *Day,* cited supra, clearly indicates that the determination of whether or not such a tax unduly burdens State functions is as much an economic as a legal question. Just when a nondiscriminatory income tax, laid by one government upon the compensation of the employees of another governing body, becomes a restraining or hampering influence is a matter of practical effect and susceptibility to economic measurement.

In this connection, Mr. Justice Stone, speaking for the majority of the Court in the *Gerhardt case,* and in referring to the principal emphasized in these cases which limit the immunity doctrine, said:

> The other principle exemplified by those cases where the tax laid upon individuals affects the State only as the burden is passed on to it by the taxpayer, forbids recognition of the immunity when the burden on the States is so speculative and uncertain that if allowed it would restrict the Federal taxing power without affording any corresponding tangible protection to the State government; even though the function be thought important enough to demand immunity from a tax upon the State itself, it is not necessarily protected from a tax which may well be substantially or entirely absorbed by private persons.

And further:

> The State and National Government must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a State government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents to the organization within the same territory of two governments, each possessed of the taxing power.

It should be kept in mind that the proposal before us provides only for nondiscriminatory taxation of the compensation of public employees and is reciprocal in nature. Thus, whatever burden might be passed on to one government because of the taxation of its employees' compensation by another governmental unit would, in a measure at least, be offset by the converse application of the proposal.

It is believed that the bill will afford to the Court a proper opportunity to redefine and clarify the limits to which governments may go in subjecting the compensation of public employees to taxation.

6. Some of the members of your committee believe that, even if these arguments are not convincing to the Court, the legislation might nevertheless be upheld under the plain language of the sixteenth amendment giving Congress the power to tax income "from whatever source derived." Language substantially identical to that phrase has been used in prior revenue acts. The Department of Justice study, page 152, points out:

the same words in substantially identical phrasing were used in the Civil War income tax laws and in the Income Tax Act of 1894. In each instance they were used to include income from all sources. In the Civil War Acts the words included income from the so-called immune sources, as shown by the decision in *Collector* v. *Day*. These words, as used in the act of 1894, included interest from State and municipal bonds, as shown by the decision in the *Pollock case*. The words income from "all sources," used in the Corporate Excise Tax Act of 1909, embraced interest from State and municipal bonds as shown by the decision in *Flint* v. *Stone Tracy Co.*

Some mention may also be made of the fact that Governor Hughes opposed the ratification of the sixteenth amendment, because this language gave the power to tax municipal securities. Senators Borah and Root disputed this interpretation in the amendment, and considerable public attention was directed to this issue in the course of the ratification of the amendment. Almost a quarter of the messages of the State Governors, recommending ratification or rejection of the sixteenth amendment, discussed the interpretation placed upon it by Governor Hughes. Most of these Governors either agreed with the interpretation of Governor Hughes or stated that they were not sure whether Governor Hughes or Senator Borah was correct, but that the amendment should, nonetheless, be ratified. From this evidence, it cannot be said that the country ratified the amendment without the knowledge of the Hughes interpretation.

It is true that the Supreme Court in several cases, notably in *Evans* v. *Gore*, 253 U. S. 245, has said that the sixteenth amendment did not extend the taxing power of the Congress, but merely removed the need for apportionment. But in this case the reasoning was not necessary to reach the decision of the Court, and the scope of the sixteenth amendment was not contested by counsel for the Government.

This discussion of the scope of the sixteenth amendment, it may be repeated, is not necessarily the view of the full committee, but merely the views of some of its members.

In conclusion, your committee believes that whatever opinions may be held as to the constitutionality of this proposal, there are reasons for believing that the Supreme Court may uphold the legislation. It is the law of the Supreme Court that its opinion upon the construction of the Constitution is always open to discussion and that its judicial authority depends altogether upon the force of the reasoning by which it is supported. *The Passenger Cases*, 283 per Taney, C. J., at 473. The Court has recently demonstrated that, to quote Mr. Justice Brandeis in his dissenting opinion in *Burnet* v. *Coronado Oil & Gas Co.* (1932), 285 U. S. 393 at 405, it "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences is appropriate also in the judicial function." It was in this dissenting opinion that Justice Brandeis listed 30 occasions upon which the Supreme Court had overruled earlier decisions. In the recent case of *Helvering* v. *Mountain Pro-*

ducers Corporation (1938), 303 U. S. 376, the view expressed by Justice Brandeis in his dissenting opinion in the *Coronado Oil and Gas Co. case* was adopted by the Supreme Court and that case, as well as the earlier case of *Gillespie* v. *Oklahoma*, 257 U. S. 501 (1921), were specifically overruled.

A description of the provisions of the bill in detail now follows:

TITLE I. PROSPECTIVE TAXATION OF PUBLIC EMPLOYEES

Section 1: Section 1 of the bill amends the definition of gross income so as to include in it salaries, wages, or compensation "for personal services as an officer or employee of the State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing." Under the amendment, the wages, salaries, and compensation of all officers and employees of the respective States and of their political subdivisions and agencies and instrumentalities, without exception, are to be included in gross income for taxable periods beginning after December 31, 1938. Whether or not the language of section 22 (a) as it exists in the present law is broad enough to include in gross income the compensation of such officers and employees is not believed by the committee to be an important issue. The committee believes that it is desirable to amend the statute to remove all doubts, so that any presentation of the constitutional question with respect to taxation of Government employees will not be fettered by any problem of statutory construction.

It is not to be inferred from this amendment, however, that those groups of State and local officers and employees from whom Federal income taxes have previously been collected were not subject to tax under the language of section 22 (a) in earlier revenue acts or in the Revenue Act of 1938.

The committee amendment to the section is purely technical. After the bill passed the House, the new Internal Revenue Code became law. It supersedes the 1938 Revenue Act for taxable years beginning in 1939 and thereafter. The committee amendment makes the necessary change so that the code rather than the 1938 act is amended.

The bill contains no express provision subjecting Federal officers and employees to Federal taxation for the reason that such a provision is unnecessary. The uniform construction of the definition of gross income in all revenue acts has been that they are subject to tax and their liability to Federal tax is established beyond question.

Section 2: Section 2 eliminates the exemption from Federal income tax of compensation of teachers in educational institutions employed by Alaska or Hawaii, or any political subdivision thereof. Since all teachers employed by the States will be subject to Federal income tax under section 1 of the bill, it is believed proper to eliminate the exemption referred to so that teachers in the Territories of Alaska and Hawaii will be subject to tax to the same extent as teachers in the various States. The committee amendment makes the change in law applicable to the new code rather than the 1938 act.

Section 3: In order to facilitate reciprocal taxation as between State and Federal Governments, your committee believes that the United States should expressly consent to the taxation of the compensation of its officers and employees. Section 3 of the bill therefore provides that the United States consents to the taxation of compensation received after December 31, 1938, for personal service as an officer or employee of the United States, any Territory or possession or political subdivision thereof, the District of Columbia, or any agency or instrumentality of any one or more of the foregoing, by any duly constituted taxing authority having jurisdiction to tax such compensation, if such taxation does not discriminate against such officer or employee because of the source of such compensaton.

It will be noted that the consent extends to taxation not only by the State but also by other duly constituted taxing authorities, of the compensation of Federal officers and employees. Under this provision if any local governmental units have authority to and do impose income taxes, tax may be imposed upon such compensation subject to the jurisdiction of such units.

The consent is not intended to operate, nor could it operate, as a consent to any taxation to which as individuals these officers and employees are entitled to object either under the provisions of the Federal Constitution or of the constitutions or statutes of the respective States. For example, the consent has no effect upon the rights of an officer of the Federal Government to object that the imposition of a State tax upon him is invalid under

the fourteenth amendment. Thus he may urge that a particular tax is invalid as to him because of an unreasonable classification, or the lack of geographical jurisdiction to tax, or for other reasons. Similarly, the consent has no effect upon the rights which such officers and employees possess as individuals under the various State constitutions and laws. To protect the Federal Government against the unlikely possibility of State and local taxation of compensation of Federal officers and employees which is aimed at, or threatens the efficient operation of, the Federal Government, the consent is expressly confined to taxation which does not discriminate against such officers or employees because of the source of their compensation. Inasmuch as section 1, relating to State and local officers and employees, applies only with respect to years beginning after December 31, 1938, section 3 consents to taxation of Federal officers and employees only with respect to compensation received after December 31, 1938.

Title II. Retroactive Relief to Certain State and Local Officers and Employees

This title affords relief to employees of States of the Union and their local governments who have not been paying Federal income tax and in many cases have not even filed returns, but who may, under *Helvering* v. *Gerhardt*, be subject to Federal income tax for past years. However, there are certain groups of State and local employees, particularly those engaged in proprietary functions (such as the operation of State liquor stores, municipal power plants, etc.), who have for a num-

ber of years regularly paid Federal tax because their liability was fully established at an earlier date. It would be unfair and inequitable to relieve this group of employees from tax liability which was in no way a surprise to them and which they paid without question. It is, therefore, undesirable to relieve, in blanket fashion, all State and local officers and employees from liability for income tax in earlier years. Since the groups who should not be relieved have regularly paid their income tax and it has been currently assessed, while those who have been surprised by the *Gerhardt case* and who should be given relief have, in most cases, not paid their tax and have not been assessed, the general plan of title II is to provide that assessments previously made shall not be disturbed but that no new assessments shall be made.

Title II applies only to State and local officers and employees and not to other persons having dealings with State and local governments, since the taxability of the compensation of such other persons has long been recognized. Such persons are generally held to be independent contractors for purposes of Federal income taxation. Their liability for such tax has been clearly established since the case of *Metcalf & Eddy* v. *Mitchell* (1926), 269 U. S. 514, and they are not officers and employees within the meaning of this bill.

Section 201: Section 201 applies to Federal income tax (including interest, additions to tax, and additional amounts), for taxable years beginning prior to January 1, 1938, attributable to compensation for personal service as an officer or employee of a State or any political subdivision thereof, or

any agency or instrumentality of any one or more of the foregoing.

Subsection (a) provides that income tax attributable to the compensation of such officers and employees for years beginning prior to January 1, 1938, which was not assessed prior to January 1, 1939, shall not be assessed and no proceeding in court for the collection thereof shall be begun or prosecuted.

Subsection (b) provides that if any such income tax for such years is assessed after December 31, 1938, the assessment shall be abated and any amount collected in pursuance thereof shall be credited or refunded in the same manner as in the case of an income tax erroneously collected. This provision thus authorizes the refund of any tax assessed against State and local officers and employees for any taxable year beginning prior to January 1, 1938, if assessment is made after 1938.

In a relatively small number of cases State and local officers and employees who are in all respects analagous to the groups given relief under section 201 (a) and (b) have paid their tax but have contested their liability by way of claim for refund rather than by contesting a deficiency asserted against them. It would be inequitable to deny relief to these people who have paid their taxes and at the same time grant relief to similarly situated persons who have not paid their taxes. Section 201 (c) therefore provides for credit or refund to such persons of income tax, for any taxable year beginning prior to January 1, 1938, attributable to compensation received as a State or local officer or employee, if the tax has been collected on or before

the date of enactment of the bill, in the following cases:

(1) where a claim for refund of such amount was filed before January 19, 1939 (the date of the President's message), and was not disallowed on or before the date of the enactment of this bill;

(2) where such claim was so filed but has been disallowed and the time for beginning suit with respect thereto has not expired on the date of the enactment of this bill;

(3) where a suit for the recovery of such amount is pending on the date of the enactment of this bill; and

(4) where a petition to the Board of Tax Appeals has been filed with respect to such amount and the Board's decision has not become final before the date of the enactment of this bill.

It is believed that the foregoing cases include virtually all State and local officers and employees who are entitled to relief from liability and who have paid their tax. In general, subsection (c) does not include those State and local officers and employees who are not entitled to relief, such as those engaged in proprietary functions, because, their liability having been previously clearly established, they have not filed claims for refund or otherwise asserted their rights in any of the ways described in this subsection.

Section 202: As has been stated, section 201 applies only with respect to income tax for taxable years beginning prior to January 1, 1938. Your committee believes, however, that it is fair and

equitable to relieve State and local officers and employees in the groups which are entitled to relief from income-tax liability for taxable years commencing during 1938. Section 202 accomplishes this result without at the same time relieving from liability the groups of State and local officers and employees, such as those engaged in proprietary functions, whose liability for Federal income tax was long previously established. It provides that a State or local officer or employee who did not include his compensation received as such in his return for a taxable year beginning during 1937, shall not include in gross income for a taxable year beginning in 1938 compensation received as such an officer or employee. Obviously, if an individual did not file a return he did not include his compensation in his return. Under this provision a person who, for the first time, becomes during 1938 an officer or employee of a State or political subdivision or agency or instrumentality thereof will be exempt from income tax for his taxable year beginning in 1938 with respect to his compensation received as such. This section also provides that although a State or local officer or employee included his compensation in gross income for a taxable year beginning during 1937, he shall be exempt from tax for the taxable year beginning during 1938, if he is entitled under section 201 to obtain credit or refund of the tax paid for the taxable year beginning during 1937.

Section 203: Sections 201 and 202 afford relief to virtually all State and local officers and employees equitably entitled thereto for taxable years beginning prior to 1939. It is possible, however,

that there may be a few cases, not ascertainable at this time, which are not covered by these sections. For example, a public-school teacher may have paid tax on his compensation for the taxable year 1937 and, although intending to contest his liability therefor, had not filed claim for refund before January 19, 1939 (and therefore is not given relief by section 201). Since those public employees who did not pay tax are relieved from liability by sections 201 and 202, similar relief should be granted in the case of the teacher who paid his tax. Likewise, an employee of the Port of New York Authority who paid tax with respect to his compensation, but who had not filed claim for refund before January 19, 1939, should be given relief. Section 203, therefore, authorizes the Commissioner, under regulations prescribed by him with the approval of the Secretary, to grant relief by way of credit or refund. Such credit or refund under this section is to be made only if the State or local officer or employee files a claim therefor after January 18, 1939, and the Commissioner finds that disallowance of the claim would result in the application of the doctrines in the case of *Helvering* v. *Gerhardt* extending the classes of officers and employees subject to Federal taxation. It should be noted that included in the classes of employees to whom the Commissioner may give relief under this section will be employees of the type involved in the case of *Helvering* v. *Therrell*, 303 U. S. 218, since the decision in the *Gerhardt case* clarified and restated the basis for the liability for such persons for Federal income tax. Such relief may be granted by the Commissioner with respect

to claims for refund for a taxable year beginning during 1938 as well as all taxable years prior thereto, subject to the qualification of section 204.

Section 204: Section 204 provides that the claims for refund, suits, or petitions to the Board referred to in the preceding sections are subject to the statute of limitations properly applicable thereto.

Section 205: This section provides that "compensation" as used in sections 201, 202, and 203 shall not include compensation to the extent that it is paid directly or indirectly by the United States or any agency or instrumentality thereof. The effect of this definition is to grant relief not only in the ordinary case in which the compensation of the officer or employee is paid in the form of a salary but also in cases where compensation is derived from fees. In a number of States, State and local officers receive their compensation in the form of charges and fees which are collected from litigants, banks, and others with respect to whom the officer exercises a State function such as that of a master in chancery or a liquidator of a bank or insurance company. They are just as truly State and local officers as if they were paid a salary and the relief is therefore made applicable to them.

Section 206: This section provides that the terms used in the bill shall have the same meaning as when used in title I of the Revenue Act of 1938. The committee amendment to the section makes the meaning of terms used in the Internal Revenue Code applicable.

Section 207: This section provides for the separability of the titles of the bill.

U. S. GOVERNMENT PRINTING OFFICE 1939

FILE COPY

No. 491

In the Supreme Court of the United States

OCTOBER TERM, 1938

THE STATE TAX COMMISSION OF UTAH ET AL.,
PETITIONERS

v.

W. Q. VAN COTT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

1. The Utah statute, reprinted in the brief for the respondent (p. 66), excludes from gross income "amounts received as compensation, salaries or wages from the United States or any possession thereof for services rendered in connection with the exercise of an essential governmental function." The state court held the respondent exempt. The decision of the state court seems to be placed upon the state statute alone (see R. 48, 62), even though in the interpretation of this statute it relied almost exclusively upon decisions of this Court, which were based upon the implications of the Federal Constitution.

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If this analysis of the opinion be correct, the decision below was on a question of state law. See brief for respondent (pp. 4–14); brief for the United States in *Graves* v. *New York ex rel. O'Keefe*, No. 478, this Term (pp. 14–15). It results that, whether or not the Federal Constitution or statutes give respondent an immunity from the tax, the judgment is adequately supported by a state ground. It is, therefore, our view that this Court has no jurisdiction to review the case, and that the writ of certiorari should be dismissed. *Miller's Executors* v. *Swann*, 150 U. S. 132; *Lynch* v. *New York ex rel. Pierson*, 293 U. S. 52, 54–55; *Fox Film Corp.* v. *Muller*, 296 U. S. 207, 210.

2. If, however, the Court is of the view that the judgment below is not based on a state ground, we submit that it should be reversed. Our views have been fully stated in our brief in the *O'Keefe* case and will be repeated here only in summary form. (a) The respondent has the immunity which attaches to any officer of the United States, since the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation are arms and instrumentalties of the United States and therefore cannot be said to be in exercise of "proprietary" or "nonessential" functions (*O'Keefe*, pp. 17–39; Resp., pp. 11–17, 23–40).[1] (b) But the

[1] References are to the brief for the United States in *Graves* v. *New York ex rel. O'Keefe*, No. 478, this Term, and to the brief for the respondent in the present case.

officer of the United States has no constitutional immunity against the inclusion of his salary in the basis of a net income tax (*O'Keefe*, pp. 39–121). (c) Congress has provided no statutory exemption, and it is not to be implied from the silence of Congress (*O'Keefe*, pp. 121–134).

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

FEBRUARY 1939.

U. S. GOVERNMENT PRINTING OFFICE 1939

SUPREME COURT OF THE UNITED STATES.

No. 491.—October Term, 1938.

The State Tax Commission of Utah, et al., Petitioners, vs. W. Q. Van Cott. } On Writ of Certiorari to the Supreme Court of the State of Utah.

[March 27, 1939.]

Mr. Justice Black delivered the opinion of the Court.

The State of Utah's income tax law, effective in 1935, exempts all "Amounts received as compensation, salaries or wages from the United States . . . for services rendered in connection with the exercise of *an essential governmental function*."[1] (Italics supplied.) In his return of income taxes to the State for 1935 under this law, respondent claimed "as deduction" and "as exempt" salaries paid him as attorney for the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation, both Federal agencies. The exemptions were denied by the Tax Commission of Utah, but the Utah Supreme Court reversed.[2] Before the Commission and in the Supreme Court of Utah, respondent asserted, first, that his salaries were exempt by the terms of the State statute itself, and, second, that they could not be taxed by the State without violating an immunity granted by the Federal Constitution. In holding respondent's income not taxable, the Supreme Court of Utah said: "We shall have to be content to follow, as we think we must, the doctrine of the Graves Case [*Rogers* v. *Graves*, 299 U. S. 401], until such time as a different rule is laid down by the courts, the Congress, or the people through amendment to the Constitution."[3] The *Graves* case applied the doctrine that the Federal Constitution prohibits the application of State income taxes to salaries derived from Federal instrumentalities. We granted certiorari, in the present case, because of the importance of the prin-

[1] Revised Stat. of Utah, 1933, Sec. 80-14-4, (2) (g).

[2] 79 Pac. (2d) 6.

[3] *Id.*, 14.

ciple of Constitutional immunity from State taxation which the Utah court apparently thought controlled its judgment.[4]

Respondent contends that the Utah Supreme Court's decision "was based squarely upon the construction of the Utah taxing statute which was held to omit respondent's salaries as a subject of taxation, and therefore that decision did not and could not reach the Federal question and should not be reviewed." But that decision cannot be said to rest squarely upon a construction of the State statute. The Utah court stated that the question before it was whether respondent's salaries from the agencies in question were "taxable income for the purpose of the State income tax law," and that the answer depended upon whether these agencies exercised "essential governmental functions." But the opinion as a whole shows that the court felt constrained to conclude as it did because of the Federal Constitution and this Court's prior adjudications of Constitutional immunity. Otherwise, it is difficult to explain the court's declaration that respondent could not be taxed under the "doctrine of the *Graves* case *until such time as a different rule is laid down by the courts, the Congress or the people through amendment to the Constitution.*" (Italics supplied.) If the court were only incidentally referring to decisions of this Court in determining the meaning of the State law, and had concluded therefrom that the statute was itself intended to grant exemption to respondent, this Court would have no jurisdiction to review that question.[5] But, if the State court did in fact intend alternatively to base its decision upon the State statute and upon an immunity it thought granted by the Constitution as interpreted by this Court, these two grounds are so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the State law.[6] Whatever exemptions the Supreme Court of Utah may find in the terms of this statute, its opinion in the present case only indicates that "it thought the Federal Constitution [as construed by this Court] required" it to hold respondent not taxable.[7]

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[4] — U. S. —.

[5] Miller's Executors v. Swann, 150 U. S. 132, 136; Interstate Railway Co. v. Massachusetts, 207 U. S. 79, 84; Louisville and Nashville Railroad Co. v. Western Union Telegraph Co., 237 U. S. 300, 302; cf. Carmichael v. Southern Coal Co., 301 U. S. 495, 507.

[6] Abie State Bank v. Bryan, 282 U. S. 765, 773.

[7] Cf. Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 120; Tipton v. Atchison Ry. Co., 298 U. S. 141, 152, 153; Illinois Cent. R. R. v. Messina, 240 U. S. 395, 397.

After careful review of this Court's decisions on the question of intergovernmental immunity, the State court concluded that the Reconstruction Finance Corporation and the Regional Agricultural Credit Corporation were "instrumentalities" performing "essential governmental duties" and that State taxation of respondent's salaries violated the Federal Constitution as interpreted by the *Graves* case. Anticipating that this Court might re-examine that interpretation and apply a "different test", the State court said that "Until such is done the States are bound by the decision of the Supreme Court in . . . Rogers v. Graves, supra."

We have now re-examined and overruled the doctrine of *Rogers* v. *Graves* in No. 478, *Graves* v. *O'Keefe*, this day decided. Salaries of employees or officials of the Federal Government or its instrumentalities are no longer immune, under the Federal Constitution, from taxation by the States. Whether the Utah income tax, by its terms, exempts respondent, can now be decided by the State's highest court apart from any question of Constitutional immunity, and without the necessity, so far as the Federal Constitution is concerned, of attempting to divide functions of government into those which are essential and those which are non-essential.

"We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question, but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case."[8]

Applying this principle, we vacate the judgment of the Supreme Court of Utah and remand the cause to that court for further proceedings.

Judgment vacated.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

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[8] Patterson v. Alabama, 294 U. S. 600, 607.